92-1843

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

JAMES G. POSTON,

Petitioner,

v.

JoANNE POSTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Vermont Supreme Court contravene Article IV, Section 1 of the United States Constitution by failing to accord full faith and credit to all aspects of the divorce decree of the 78th District Court of Wichita County, Texas, on the grounds that the Texas court lacked personal jurisdiction over the respondent, a former domiciliary of Texas?

2. Whether consistent with the protections of the Due Process Clause, the Texas court properly exercised personal jurisdiction over the respondent, a former domiciliary of Texas, in an action for divorce, where the parties had lived in some six states and fifteen residences prior to the filing of the divorce; where respondent was subject to the jurisdiction of the Texas court under the Texas Family Code; where respondent conceived, gave birth, and resided with the parties' child in Texas; and where respondent's husband re-established Texas as his domicile?

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PETITION FOR WRIT OF CERTIORARI

Petitioner James G. Poston, the Defendant below, respectfully prays that a Writ of Certiorari issue to review the judgment of the Vermont Supreme Court which affirmed the decision of the Orleans Family Court of Orleans County, Vermont. In affirming the decision of the Orleans Family Court, the Vermont Supreme Court refused to accord the decree of divorce of the 78th District Court of Wichita County, Texas, full faith and credit as required by Article IV, Section 1 of the United States Constitution. The Vermont Supreme Court determined that Texas lacked personal jurisdiction over the respondent, JoAnne Poston.

OPINIONS BELOW

The opinion of the Vermont Supreme Court is published in 4 Vermont Law Week 26 (Feb. 19, 1993). A copy of the Vermont Supreme Court's slip opinion is set forth in the Appendix. (A1-10). The decree of divorce of the 78th District Court of Wichita County, Texas (Texas court) is unpublished and is set forth in the Appendix. (A11-30). The decision and order of the Orleans Family Court, Orleans County, Vermont (Vermont court) is unpublished and is set forth in the Appendix. (A31-58).

JURISDICTION

The Vermont Supreme Court entered judgment in this case on February 19, 1993. The jurisdiction of the United States Supreme Court to review the judgment of the Vermont Supreme Court by Writ of Certiorari is conferred by 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Constitution, Article IV, Section 1:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.

State of Texas, 1 Texas Family Code Annotated, §3.26:

> The complete text of §3.26 with revision history is set forth in the Appendix. (A59-60).

State of Texas, 1 Texas Family Code Annotated, §11.051:

> The complete text of §11.051 with revision history is set forth in the Appendix. (A60-61).

STATEMENT OF THE CASE

> *If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom. Today many people who have simply lived in more than one state do not know, and the most learned lawyer cannot advise them with any confidence. The uncertainties that result are not merely technical, nor are they trivial; they affect fundamental rights and relations such as the lawfulness of their cohabitation, their children's legitimacy, their title to property, and even whether they are law-abiding persons or criminals. In a society as mobile and nomadic as ours, such uncertainties affect large numbers of people and create a social problem of some magnitude. It is therefore important that, whatever we do, we shall not add to the confusion.*

Estin v. Estin, 334 U.S. 541, 553 (1948) (Jackson, *J.*, dissenting).

Petitioner, James Poston, seeks relief in this Court due to the failure of the courts of Vermont, including the Vermont Supreme Court, to accord the final divorce decree of the 78th District Court of Wichita County, Texas, full faith and credit as guaranteed by Article IV, Section 1 of the United States Constitution.

The Vermont Supreme Court recognized that the parties were already validly and finally divorced by the Texas court both at the time the Orleans Family Court conducted its hearings and when it issued its Findings of Fact, Conclusions of Law and Order on February 28, 1992. *See* (A5) ("There is no question that the Texas court had jurisdiction to end the parties' marriage"). Notwithstanding, the Vermont court proceeded to consider anew, all of the financial incidents of the divorce, as well as the rights and obligations of the parent-child relationship.

The Texas court had not merely adjudicated the dissolution of the parties' marriage. The Texas court had considered the extent of its authority over Ms. Poston, a domiciliary of Vermont, and made findings as a matter of fact and law that Ms. Poston had proper notice of the Texas action, and had sufficient contacts with Texas to justify the exercise of personal jurisdiction. As a result, the Texas court considered all of the financial and personal incidents of the divorce. Its extensive order gave Ms. Poston custody of the parties' two children, established Mr. Poston's child support obligations, allocated the parties' property, and provided for a future income payments to Ms. Poston. (A11-30).

Despite the existence of a complete and final Texas divorce order based on the Texas court's findings of personal jurisdiction over Ms. Poston, the Vermont Supreme Court independently determined, with no deference to the Texas court's order, that Texas lacked minimum contacts with Ms. Poston, and thus had no personal jurisdiction over her. (A7-8). As a result, the Vermont Supreme Court ruled that all aspects of the Texas court's order beyond that dissolving the parties' marriage had no binding effect. Thus, the Vermont Supreme Court concluded that the Orleans Family Court had acted properly in substituting its own judgment regarding the appropriate level of child support and maintenance (alimony), and the proper distribution of the parties' property. (A8).

A. Statement of Facts

During the sixteen-year period in which the parties were married and resided together, they lived in nine different cities and fifteen different residences. (A39). The parties met in 1970 in Memphis, Tennessee. Upon their marriage in 1971, they moved to Dallas, Texas where they established a marital domicile for three years. During this period, Ms. Poston was employed as a registered nurse, and conceived and gave birth to the parties' first child, Rachel, in July of 1973. (A36). The parties then lived in a number of states and cities, including Zenia, Ohio; Panama City, Florida; Jackson, Mississippi; Rochester, Minnesota; and Norwich, Vermont. During the parties' stay in Florida, a second child, Ellen, was born in May of 1975. Immediately prior to their separation in October of 1987, the parties lived in Newport, Vermont. Ms. Poston remained a resident of the Town of Newport, and thus a domiciliary of Vermont. After the separation, Mr. Poston returned to Texas and became a domiciliary of Wichita Falls, Texas.

B. Procedural Posture

In May of 1989, over one and a half years after the separation, Mr. Poston decided to file for divorce. The District Clerk's Office of Wichita County properly served Ms. Poston with the divorce petition and citation. After consulting with Texas counsel, Ms. Poston defaulted in the Texas action and later filed her own divorce complaint in Vermont. While visiting the children in Vermont on August 28, 1989, Mr. Poston was personally served with Ms. Poston's Vermont complaint. The sufficiency of service in both actions is uncontested.

The Texas matter proceeded to a hearing some sixteen months prior to the first merits hearing in the Vermont action. The Texas court issued its decree of divorce on March 20, 1990. (A11). In its decree, the Texas court found that Ms. Poston had been properly served, but voluntarily chose not to participate in the Texas action. It found that Mr. Poston was a bona fide resident and domiciliary of the State of Texas for a period well in excess of its six-month jurisdictional residency requirement for divorce. Further, the Texas court found that it had sole and exclusive jurisdiction over the cause of action and the parties, and that Ms. Poston, though properly served, had "not appeared and wholly made default." (A11-12). In addition, the Texas court found adequate grounds to grant the parties a divorce.

In its nineteen-page decree, the Texas court appointed Ms. Poston the Sole Managing Conservator of the Children (custodian) and appointed Mr. Poston Possessory Conservator, granting visitation rights to be exercised during the children's school and summer vacations. The Texas court ordered Mr. Poston to pay child support in the amount of $2,500 per month for the parties' then two minor children. This amount was to be reduced to $2,000 per month when the oldest child reached majority in July of 1991. As well, the Texas court ordered Mr. Poston to pay tuition in the approximate amount of $10,000 per year for the children's private schooling, that he continue to provide for the children's health insurance and pay all uninsured medical costs, that he provide each child with an automobile and pay its associated expenses, and that he pay all travel costs associated with visitation between Vermont and Texas by supplying the children with prepaid airline tickets. In calculating the child support award, the Texas court took these additional financial

obligations into consideration, as well as the $70,000 that Mr. Poston had put aside for the children's college education under the Uniform Gift to Minor's Act. (A15-22).

In considering property division, the Texas court found that at the time of their separation, the parties had entered an agreement to partition their property and that property thereafter acquired would remain the sole and separate property of each. The Texas court found that the parties had fully performed the contractual agreement and that, in fact, Ms. Poston had received benefits substantially in excess of one-half the property then in existence. (A23).

Texas is a community property state and, although it does not order maintenance or alimony as such, where justice requires, the courts do order future payments of property in lieu of support. In considering these issues, the Texas court determined that the net equity value of Mr. Poston's newly-established medical practice was small and was required to be offset by the good will attributable to him, an asset not subject to property division under the laws of Texas. (A24-25). The Texas court considered that both parties were "professionally trained and licensed and physically capable of working full-time and thereby being self-sufficient from their individual earnings." (A29). Thus, the Texas court ruled that "no reason nor necessity exists to order future monthly payments for support to [Ms. Poston] from [Mr. Poston]." (A30). Though Ms. Poston had "received benefits substantially in excess of one-half (½) of the property which was then in existence," the Texas court, in consideration of all the circumstances, including Mr. Poston's greater income, awarded Ms. Poston an additional $30,000. (A23, 30).

Well over one year after the issuance of the Texas order, the Orleans Family Court of Orleans County, Vermont, conducted hearings on the merits of Ms. Poston's divorce petition. The Vermont court denied Mr. Poston's motion to dismiss the matter on full faith and credit grounds. In its Findings of Fact and Conclusions of Law, and Order, dated 28 February 1992 and filed 4 March 1992, the Vermont court ignored the Texas order, except insofar as it dissolved the marriage, and went on to consider parental rights and responsibilities (custody and visitation), property, maintenance (alimony), and child support *ab initio*.[1] (A45-58).

Although the Vermont court could have had the jurisdiction to modify the Texas child support order upon a proper showing of changed circumstances, *see* 15 V.S.A. §660, Ms. Poston did not seek modification. Thus, the Vermont court conducted a *de novo* determination of Mr. Poston's child support obligations. It ordered child support in the amount of $2,500 per month for the parties' one remaining minor child (since the time of the Texas order, the parties' oldest child, Rachel, had attained majority). In addition, the Vermont court ordered a "maintenance supplement" (essentially additional child support under the law of Vermont, *see* 15 V.S.A. §661) in the amount of $1,500 per month for so long as the child support order remained in effect. Thus, for one child, the support obligation was $4,000 per month, in addition to the Vermont court's order that Mr. Poston pay secondary school tuition, maintain health insurance and pay all uninsured expenses, pay all expenses and costs associated with the child's vehicle, and pay all travel costs associated with his exercise of visitation rights. (A56-57).

[1] Since there existed no dispute regarding custody and visitation, Mr. Poston did not contest or appeal these aspects of the Orleans Family Court's order and these issues are not now before this Court.

Again ignoring the Texas court's order, and failing to address the issue of which state's law to apply, the Vermont court ordered Mr. Poston to pay maintenance (alimony) to Ms. Poston starting at $1,000 per month. When the youngest child reached majority, thereby causing Mr. Poston's $4,000 monthly support obligation to cease, the Vermont court ordered that Ms. Poston's maintenance award automatically increase to $5,000 per month. Thus, the Vermont court ordered permanent level payments of $5,000 per month to Ms. Poston, thereby nullifying the effect of its own child support order. (A57).

After Mr. Poston filed his appeal with the Vermont Supreme Court, Ms. Poston filed two petitions for contempt in the Orleans Superior Court. At each hearing, Mr. Poston asserted that the Vermont court had no jurisdiction to issue its March 4, 1992 order given the prior final adjudication of the parties' divorce by the Texas court. Mr. Poston established that he was in compliance with the Texas order and maintained that the court could not hold him in contempt of an invalid court order. The Orleans Superior Court nonetheless found Mr. Poston in contempt of the March 4th order of the Orleans Family Court on both occasions and reduced to judgment the arrearage in child support and maintenance allegedly due thereunder.

Mr. Poston filed timely Notices of Appeal with respect to both of the contempt orders. The contempt appeals were consolidated with the appeal to the Vermont Supreme Court of the underlying divorce order of the Orleans Family Court. The Vermont Supreme Court affirmed the orders of the Vermont trial courts in all respects.

REASONS FOR GRANTING THE WRIT

Time and again, this Court has explained that the Full Faith and Credit Clause of the United States Constitution requires that each state recognize and give effect to the judicial decrees of other states, including court orders regarding divorce.[2] *See Williams v. North Carolina*, 317 U.S. 287, 302 (1942) ("Williams I"). The entitlement of another state's divorce order to full faith and credit, however, is not automatic, nor is the extent to which full faith and credit must be given the same in all circumstances. *Id.* at 294. Another state's decree, however, carries with it a presumption of validity, and the party collaterally attacking another state's order bears a heavy burden. Only where the party attacking another state's decree can show that the decree was obtained without properly invoking the subject matter jurisdiction of the decreeing state, or where the decree was obtained in violation of the requirements of due process, will a court be justified in failing to accord full faith and credit to another state's decree. *See Williams v. North Carolina*, 325 U.S. 226, 233 (1945) ("Williams II").

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[2] Article IV, §1 provides in pertinent part that "Full Faith and Credit shall be given in each state to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, §1.

A. Mr. Poston Properly Invoked the Subject Matter Jurisdiction of the Texas Court.

There exists no dispute here that Mr. Poston properly invoked the subject matter jurisdiction of the Texas court. Mr. Poston was a "bona fide resident and domiciliary of the State of Texas for a period well in excess of the six months jurisdictional requirement." (A12). While *Williams (I)* and *Estin* hold that full faith and credit attaches even when the non-resident spouse was not served with process, here, the record is clear that Ms. Poston received actual notice of the Texas proceedings when she was served by certified mail, return receipt requested, a manner of service consistent with Texas law. Ms. Poston received the summons and pleadings and mailed back the citation signifying personal service. (A11-12). Thus, Ms. Poston received notice authorized under the laws of Texas and sufficient to satisfy the demands of due process. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The Orleans Family Court and the Vermont Supreme Court agreed that the Texas court had the authority to divorce the parties. (A47; A5). As a result, Article IV compelled the Vermont courts to provide the parties' Texas divorce with the same credit, validity, and effect that it had in Texas.

While it properly recognized that the Texas court had conclusively dissolved the parties' marital status, the Vermont Supreme Court erred in refusing to accord the balance of the Texas court's divorce order full faith and credit as demanded by Article IV. (A6-7). In short, the Vermont court had no authority to fashion an order concerning maintenance, property division, and child support, since the Texas court had personal jurisdiction over Ms. Poston and had already issued a detailed and comprehensive nineteen-page order which conclusively resolved these issues.

B. Pursuant to §11.051 of the Texas Family Code, the Texas Court had Personal Jurisdiction over Ms. Poston and Therefore Could Properly and Conclusively Adjudicate the Incidents of Divorce.

The Texas court clearly had personal jurisdiction over Ms. Poston under Texas law. (A12). Section 11.051 of the Texas Family Code specifically delineates that a Texas court can exercise personal jurisdiction in any suit affecting the parent-child relationship if:

> (1) the child was conceived in this state when at least one biological parent was a resident of this state and the person on whom service is required is a parent or an alleged or probable father of the child;
>
> (2) the child resides in this state as a result of the acts or directives or with the approval of the person on whom service is required;
>
> (3) the person on whom service is required has resided with the child in the state; or
>
> (4) there is any basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction.

1 Tex. Fam. Code Ann. §11.051.[3] (A60).

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[3] In the alternative, §11.051 also provides that a Texas court may exercise subject matter jurisdiction pursuant to Subchapter B, *see* §11.51, the Texas codification of the Uniform Child Custody Jurisdiction Act (UCCJA). *See* 1 Tex. Fam. Code Ann. §11.051. Since there exists no dispute between the parties regarding the "custody" of their children, the issue of whether Texas or Vermont had subject matter jurisdiction concerning the custody of the parties' children was not an issue before the Vermont Supreme Court and will not be addressed in this petition.

It is important to note, however, that the authority to adjudicate a "custody determination" under the UCCJA does not include the authority to decide child support or any other monetary obligation of any person. *See* UCCJA §2(2); 1 Tex. Fam. Code Ann. §11.52; and 15 V.S.A. §1031(2) (custody determination "does not include a decision relating to child support or any other monetary obligation of any person").

In a provision which parallels §11.051(4), the Texas long-arm statute provides that a Texas court may exercise personal jurisdiction over a non-resident if "there is any basis consistent with the constitutions of this state and the United States." 1 Tex. Fam. Code Ann. §3.26. (A59). There exists no dispute that §11.051 applies to Ms. Poston by virtue of, not one, but two of its specific subsections. First of all, the parties conceived and gave birth to one of their children in Texas, while both parties were residents of the state, thereby satisfying §11.051(l). Secondly, Ms. Poston resided in Texas with her children for a period of three years. Indeed, Ms. Poston went beyond merely establishing residence in Texas, she in fact made Texas both her marital domicile and the domicile of her first-born. Therefore, subsection 3 of §11.051 properly applied to Ms. Poston.

The Texas court's order came before the Vermont courts imbued with a presumption of validity. The Vermont Supreme Court, however, failed to recognize this presumptive validity of the Texas court's exercise of personal jurisdiction and proceeded to undertake a wholly *ad hoc* evaluation of whether it was reasonable to subject Ms. Poston to personal jurisdiction in Texas.

C. Pursuant to the Due Process Clause of the Fourteenth Amendment, It was Fundamentally Fair, Just, and Reasonable for Texas to Assert Jurisdiction Over Ms. Poston.

For a non-resident to be subject to the authority of a state's court, due process demands that the non-resident have sufficient contacts with that state such that traditional notions of fair play and substantial justice are not offended. *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977). *See also, Kulko v. California Superior Court*, 436 U.S. 84, 92 (1978) (essential inquiry is always whether quality and nature of defendant's activity in forum state render it reasonable and fair to require defendant to conduct defense in that state). Thus, the Due Process Clause protects an individual's liberty interests from being subject to the binding judgments of a state in the absence of meaningful contacts, ties, or relations. *See Burger King, Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985). The Due Process requirement of contacts, ties, or relations with the forum state provides a person with fair warning that a particular activity in a state will create personal jurisdiction in that state's courts. *See Shaffer*, 433 U.S. at 218 (Stevens, *J.*, concurring in judgment). Thus, potential defendants have notice as to where their conduct will and will not subject them to suit and thereby have the opportunity to structure their actions accordingly. *See World-Wide Volkswagen, Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Thus, the "fair warning" requirement is readily satisfied where the defendant has purposefully directed her activities at a resident of the forum and the litigation arises out of or relates to those activities. *See Burger King*, 471 U.S. at 472.

(i) By Engaging in Purposeful Activities in Texas, Ms. Poston Forged Contacts, Ties, and Relations with Texas Sufficient to Satisfy the Concerns of the Due Process Clause.

The criteria outlined in §11.051 of the Texas Family Code articulate specific examples of the minimum contacts, ties, and relations which Texas considers sufficient to subject a non-resident defendant to suit in Texas.[4] Conceiving a child in Texas and establishing residence with a child in Texas both constitute purposeful acts undertaken in the forum state. These acts necessarily provide any potential defendant with fair warning that such activities will create personal jurisdiction over her in the Texas courts in matters which arise out of or relate to the child's conception and residence with a child in Texas.

Here, Ms. Poston purposefully directed her activities toward Texas and its resident (Mr. Poston and their first child) both by conceiving a child and residing with that child in Texas. Since residency supplies contact sufficient

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[4] It is noteworthy that the Uniform Interstate Family Support Act (UIFSA) adopts a statutory framework for the exercise of personal jurisdiction over a non-resident which reflects the Texas approach. Section 201 of UIFSA provides in pertinent part that a state may exercise personal jurisdiction if:

* * *

(3) the individual resided with the child in this State;

(4) the individual resided in this State and provided prenatal expenses or support for the child;

(5) the child resides in this State as a result of the acts or directives of the individual; [and]

(6) the individual engaged in sexual intercourse in this State and the child may have been conceived by that act of intercourse.

UIFSA §201(3)-(6).

UIFSA was approved by the National Conference of Commissioners of Uniform State Laws at its August 1992 meeting.

for §11.051 and due process purposes, Ms. Poston's establishment of domicile in Texas surely meets the test of contact sufficient to satisfy due process concerns as domicile embodies an even stronger bond to a state than mere residency. *See Williams I*, 317 U.S. at 298 ("Domicile creates a relationship to a state which is adequate for numerous exercises of state power"). *See also* A. Rutkin, *Family Law and Practice*, §3.01[2][a] (1992). It cannot be denied that the conception and birth of a first child in Texas and the maintenance of a Texas domicile for three years for both child and the marriage, constitute anything other than purposeful activity undertaken in Texas. Thus, Texas' personal jurisdiction over Ms. Poston arises, not from fortuitous act of another or happenstance, but from the actions of Ms. Poston herself, which in turn, created substantial connections with the forum state. *See Burger King*, 471 U.S. at 475.

(ii) The Texas Divorce Proceedings Arose Out of and Related to Ms. Poston's Purposeful Activities in Texas.

The relationship between Ms. Poston's Texas contacts and the Texas court divorce proceedings is both direct and substantial. The Texas court sought to establish Mr. Poston's child support obligations, and as such, the Texas divorce proceedings clearly qualified as a suit affecting parent-child relationship. *See* 1 Tex. Fam. Code Ann. §11.051. In a broader sense, the Texas divorce proceedings necessarily relate to or are connected with the parties' marital domicile, particularly where that domicile remains, or again becomes, the domicile of one of the spouses. Unlike the case in *Kulko* where the defendant's only connection with the forum state was his marriage there during a three-day military stop-over thirteen years before the divorce, Ms. Poston actually conceived and gave birth to a child in Texas, and made Texas her marital domicile along with that of the child. A portion of the Texas divorce proceedings concerned the support of that child. Given Mr. Poston's resumption of domicile in Texas, the nexus between Ms. Poston's purposeful Texas activities and the Texas divorce proceedings becomes readily apparent. *Compare Kulko*, 436 U.S. at 93 (where parties married in California during three-day military stop-over and spent entire married life in New York, California marriage by itself could not support California court's exercise of personal jurisdiction to determine child support obligation of spouse who remained a New York resident).

D. Requiring Ms. Poston to Defend Herself in Texas Did Not Offend Traditional Notions of Fair Play and Substantial Justice.

Given her purposeful establishment of contacts, relations and ties with Texas, Ms. Poston was subject to binding judgment in Texas unless analysis of the other relevant factors identified in *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945) and its progeny compells the conclusion that the exercise of personal jurisdiction would work a manifest injustice. *See Burger King*, 471 U.S. at 477 ("Once it has been decided that a defendant purposefully established minimum contacts in the forum state, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice' ").[5]

As a general matter, the State of Texas has a well-recognized interest in providing relief to a resident plaintiff's forum of choice. *See Kulko*, 436 U.S. at 92. In addition, Texas has a legitimate state interest in establishing Mr. Poston's child support obligations, since it is the law of Texas that determines such obligations and the courts of Texas that will be called upon to enforce those obligations should the need arise.[6] *See Id.*

[5] Where appropriate, the court may evaluate the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the defendant's burden from litigating in the forum state, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 266, 292 (1980).

[6] The Uniform Reciprocal Enforcement of Support Act adopted by both Texas and Vermont provides that the duties of support are those imposed under the laws of the state where the obligor was present for the period during which support is sought. *See* 1 Tex.

(Footnote continued on following page.)

at 100 (California's substantial interest in protecting resident children and of facilitating support actions on their behalf did not transform California into a "fair forum" for New York resident). The fact that the parties' remaining minor child lives in Vermont when not attending private school in Quebec does not compel a contrary conclusion. Vermont's legitimate interest in insuring the support of its children is well protected by Vermont's codification of the Uniform Reciprocal Enforcement and Support Act. *See* 15 V.S.A. §§395-422. Therefore, it is Texas that has the superior interest with respect to the establishment of the child support obligations of its resident.

Further in ruling that Texas lacked jurisdiction over Ms. Poston, the Vermont Supreme Court in a footnote glossed over §11.051 of the Texas Family Code, the State of Texas' clear expression of its particularized interest in trying in its own courts cases involving the matters at issue here. (A8). This stands in stark contrast to *Kulko,* where this Court, in ruling against the exercise of personal jurisdiction, noted the absence of any attempt by California to assert its interest by passage of a special jurisdictional statute. *See Kulko,* 436 U.S. at 98.

An examination of the burdens that Ms. Poston would have faced had she chosen to litigate the divorce in Texas does not provide grounds to disallow the Texas court's exercise of personal jurisdiction. The fact that

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(Footnote continued from preceding page.)

Fam. Code Ann. §21.07; 15 V.S.A. §401. Similarly, the Texas and Vermont enactments of the Uniform Child Custody Jurisdiction Act clearly delineate that authority to decide custody does not include authority to establish child support. *See* 1 Tex. Fam. Code Ann. §11.52(2); 15 V.S.A. §1031(2). Therefore, Texas was the proper source of law and the appropriate forum in which to determine Mr. Poston's child support obligations.

Ms. Poston might have had to shoulder some burden is not dispositive because defending a law suit in a foreign state almost always requires more of a non-resident defendant than does litigating in that defendant's home state. Thus, "the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." *Burger King*, 471 U.S. at 474.

Advancements in modern communications and transportation, and the availability of procedural devices and protections, have significantly eased any burdens which arise from litigation in a distant state. *See Burnham v. Superior Court of California*, 495 U.S. 604, 638 (1990) (Brennan, *J.*, concurring in judgment, joined by Marshall, Blackmun, and O'Connor, *JJ.*) (certainly "any burdens that do arise can be ameliorated by a variety of procedural devices"). *See also Id.* at 639 n.13 (detailing numerous ways of avoiding spurious suits, methods of obtaining discovery, and means of obtaining costs and attorney's fees); *Burger King*, 471 U.S. at 477 ("potential clash of the forum's law with the 'fundamental substantive social policies' of another State may be accommodated through application of the forum's choice-of-law rules . . . [and] defendant claiming substantial inconvenience may seek a change of venue").

In any event, in challenging the jurisdiction of the Texas court, Ms. Poston had the burden and obligation "to present a compelling case that the presence of other considerations would render jurisdiction unreasonable." *Id.* This, however, Ms. Poston could not do for, as the Orleans Family Court correctly concluded, it was no less inconvenient for Ms. Poston to litigate in Texas than it was for Mr. Poston to defend himself in Vermont. (A49).

Because it assumed Ms. Poston had no minimum contacts with Texas, the Vermont Supreme Court never assessed whether the Texas court's assertion of jurisdiction was fair and reasonable under all of the circumstances. Rather, the Vermont Supreme Court used the "minimum contacts" test as a talisman and never truly assessed whether due process supported the exercise of jurisdiction. Moreover, the decisions of the Orleans Family Court and the Vermont Supreme Court apparently assume that Texas lacked sufficient contact with Ms. Poston simply because her ties to Vermont were superior to those with Texas. Such reasoning simply misstates the fundamental fairness test of due process analysis and ignores the command of the full faith and credit clause.

The Due Process Clause requires only that a non-resident have some minimum contact, tie, or relation with the forum state. For purposes of personal jurisdiction, the test is not designed to determine with which state a person has their most significant contact. Indeed, a person may simultaneously have minimum contacts with many states. Invariably, a party's contacts with some states will be stronger than those in others. Consequently, the burdens which accompany defending a suit in some states will be greater than those which would arise from responding to a suit in others. For due process purposes, such comparisons are irrelevant; the question is not which state had the strongest contacts with Ms. Poston. Rather, the proper inquiry is whether Ms. Poston had sufficient contacts, ties or relations with Texas to make it fair for her to be subject to suit there. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775-76, 778 (1984).

Justice Jackson's observation that our society is one characterized by the mobility of its citizens is even more apt today than in the day of *Estin*. The Postons exemplified this truism over the course of their marriage. In a space of sixteen years, the parties established no less than six marital domiciles. As a result, both parties forged the state contacts with jurisdictional due process consequences in each of those states, particularly in Texas given the conception and birth of a child there. Thus, it does not offend notions of fair play and substantial justice for Ms. Poston to have to expect to defend herself in the state of her former marital domicile in which she conceived and gave birth to a child, and where her spouse re-established residency and domicile sufficient to create in its courts subject matter jurisdiction for a divorce.

Given the parties' transient marital history, Mr. Poston faced precisely the same risks as Ms. Poston of amenability to suit in a state of a former marital domicile, once the parties separated. Had Ms. Poston filed for divorce in Vermont first, Mr. Poston would have been subject to Vermont's long-arm jurisdiction. Considering the circumstances of the parties' marital history, it was no more unfair for Mr. Poston to have to defend himself in his former domicile of Vermont than it would have been for Ms. Poston to do likewise in Texas. (A49). *See also* C. Wright and A. Miller, 4 *Federal Practice and Procedure* §1067 at 293 (1987) (once minimum contacts threshold is satisfied, few other considerations could suffice to make the assertion of jurisdiction unfair or unconstitutional).

Ms. Poston's true motivation in collaterally attacking the Texas order stemmed from the fact that she did not strike first and obtain a Vermont divorce in which she

hoped to benefit from the greater availability of an award for supplemental maintenance (additional child support) and permanent maintenance (alimony). It cannot be assumed, of course, that the Texas court would have rendered the same decision had Ms. Poston chosen to participate in the Texas action. Had Ms. Poston chosen to make her case before the Texas court, its decision might well have been even more favorable to her. For example, Ms. Poston could have argued her side of the merits under Texas law, asked the court to apply Vermont law, and even petitioned for the award of attorneys' fees and costs. Even if, however, Vermont family law held out better prospects for Ms. Poston, the Vermont Supreme Court should not have considered such matters in its due process evaluation. Choice of law concerns are wholly separate from jurisdictional due process analysis and thus have no bearing on whether the Texas court properly assumed jurisdiction. *See Keeton*, 465 U.S. at 778 (1984) (any potential "unfairness" from application of New Hampshire's statute of limitations had nothing to do with court's jurisdiction to adjudicate claims). "The issue is personal jurisdiction, not choice of law." *Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 254 (1958)).

Mr. Poston brought suit in Texas only after far exceeding Texas's six-month residency requirements for subject matter jurisdiction, and more than a year and a half after the parties separation. (A12). Thus, there is nothing untoward, inappropriate or unfair about Mr. Poston's action. This is not the type of "quickie" divorce that has given rise to much of the litigation in the area of "divisible divorce." Both parties had minimum contacts with states of former marital residence. Thus, both were amenable to a divorce suit far from home.

After the parties separated and no longer lived in the same state, each lived with the same vulnerability for several months. Thus, it was reasonable for each spouse to expect a suit in the state of their former marital domicile. Mr. Poston filed first, but not unfairly so. The United States Constitution demands nothing more of Ms. Poston than it does of Mr. Poston. Therefore, the Vermont Supreme Court should not have allowed Ms. Poston to escape the consequences of her conscious decision to ignore the Texas proceedings.

In short, the Vermont Supreme Court erred by concluding that Texas did not have personal jurisdiction over Ms. Poston. Even assuming Ms. Poston had stronger contacts with Vermont than with Texas, she created sufficient contacts with Texas to satisfy the threshold requirements of due process for the purposes of *in personam* jurisdiction. Accordingly, the Vermont Supreme Court was wholly unjustified in ignoring the requirements of the full faith and credit clause.

CONCLUSION

WHEREFORE, for all the foregoing reasons, Petitioner respectfully requests that this Petition for Writ of Certiorari be GRANTED.

Respectfully submitted,

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APPENDIX

Opinion of the Vermont Supreme Court
Dated February 19, 1993

VERMONT SUPREME COURT

On Appeal from Orleans Family Court

December Term, 1992

NOTICE: This opinion is subject to motions for reargument under V.R.A.P. 40 as well as formal revision before publication in the Vermont Reports. Readers are requested to notify the Reporter of Decisions, Vermont Supreme Court, 109 State Street, Montpelier, Vermont 05609-0801 of any errors in order that corrections may be made before this opinion goes to press.

No. 92-139

JoAnne M. Poston

v.

James G. Poston

Shireen Avis Fisher and Walter M. Morris, *JJ.*

Charles D. Hickey, St. Johnsbury, for plaintiff-appellee

Peter F. Langrock, Kevin E. Brown and Mitchell L. Pearl of Langrock Sperry & Wool, Middlebury, for defendant-appellant

PRESENT: Gibson, Dooley, Morse and Johnson, *JJ.*, and Peck, *J.* (Ret.), Specially Assigned

MORSE, *J.* James Poston, who had already obtained a Texas divorce from JoAnne Poston, appeals the judgment of the Vermont Family Court granting JoAnne child support, maintenance and attorney's fees. James' claims of error are that once the Texas divorce had been granted, the Vermont judgment violated the federal constitutional guarantee of full faith and credit, and that Vermont lacked statutory authority for the award. We affirm.

James and JoAnne Poston were married in 1971. During the next sixteen years, they moved frequently. The first three years they lived in Dallas, Texas, where James completed his medical internship and residency. They then moved to Ohio, Florida, Mississippi, Vermont, Minnesota, and, in 1982, back to Vermont, where James worked at the North Country Hospital in Newport. The couple separated in October 1987, and James returned to Texas, his current residence. JoAnne and their two children remained in Newport.

James filed for divorce in Texas in May 1989. JoAnne was served in Vermont by certified mail, but never appeared in that action. In July 1989, JoAnne filed for divorce in Vermont. James was personally served while he was in Newport that summer, and he appeared and defended the Vermont action.

On March 20, 1990, the 78th District Court of Wichita County, Texas, issued a decree of divorce to James Poston, asserting "sole and exclusive jurisdiction" over the action and noting that JoAnne had "not appeared and wholly made default." JoAnne was given physical custody of the children. James was awarded visitation and ordered to provide the children an automobile, health insurance, education expenses, and airline tickets for visitation. He was also ordered to pay JoAnne $2,500 a

month in child support, which would be reduced to $2,000 a month when the older child no longer qualified for it. The Texas court noted that the parties had, as agreed upon, sold their residence and split the proceeds, that James had purchased a car for JoAnne, and that JoAnne had received the majority of the parties' furnishings and possessions. The court remarked that JoAnne had "received benefits substantially in excess of one-half (1/2) of the property."

Further, the Texas court found that JoAnne was employed as a trained registered nurse and also was receiving support, unspecified in amount, from James. Although JoAnne had set aside her professional aspirations in favor of those of her husband and had spent much of her married life as a homemaker, the court found that she "voluntarily chose[ ] to work only part-time in the past" and that "no reason of necessity exists" for the award of maintenance. The court valued James' anesthesiology practice, which provided him with a six-digit income, at $10,000, $9,000 of which was attributed to his goodwill, leaving a net value of $1,000. The court then awarded James all of his retirement and IRA accounts and ordered that he pay a lump sum of $30,000 to JoAnne, that each party pay their own attorneys' fees, and that James pay the court costs of bringing the Texas action. JoAnne did not appeal.

In Vermont, James sought to dismiss JoAnne's complaint under the doctrines of full faith and credit and res judicata, and on the ground that 15 V.S.A. §752 did not permit the court to order maintenance to JoAnne because she was no longer married to him. The family court denied the motion, holding that although the Texas decree served to terminate the marriage, JoAnne did not have the requisite "minimum contacts" with Texas to

subject her to personal jurisdiction there. Consequently, the Vermont court did not owe full faith and credit to the remainder of the Texas judgment. A temporary hearing was held April 18, 1991, at which the parties entered into a stipulation for child support and a temporary order governing the parties' financial and personal relationship. The matter went to trial on the merits on July 25, 1991, and September 18, 1991.

Meanwhile, in August 1991, the Texas court, finding that JoAnne's conduct caused James "great expense and anguish," issued an order enjoining JoAnne from taking any action, including a suit for divorce, that might interfere with the Texas divorce order or that would seek any process or satisfaction of any judgment in Vermont. Additionally, the Texas court ordered that JoAnne pay James $1,500,000, plus post-judgment interest, in damages should she pursue litigation and receive a judgment in Vermont against him. Finally, the Texas order was punctuated with a judgment in James' favor for $25,000 in attorney's fees incurred in defending himself in Vermont.

In February 1992, the Vermont Family Court ordered James to pay $2,500 a month in child support, maintain health insurance for the children, and pay the children's educational and transportation expenses, including the purchase and maintenance of the children's automobiles. The court found that in 1990, JoAnne earned $21,656, while James earned $441,598, and that JoAnne had a savings account and IRA account totalling $45,000 while James' Merrill Lynch and IRA accounts totalled $183,000. Based on the substantial disparity in income between the parties and the fact that JoAnne lacked sufficient property and income to meet her reasonable needs and could not support herself at the standard of

living established during the marriage, the court ordered James to pay permanent maintenance adjusted yearly for inflation. Maintenance was set at $1,000 per month while child support was owing, increasing to $5,000 per month after child support was no longer due in order to build a retirement fund for her, the payments to end when she reached age sixty-two. If JoAnne remarried, the maintenance would be reduced to $12,000 per year. James was also ordered to maintain life insurance of $500,000 for JoAnne's benefit. The court ordered James to pay $1,500 a month in a maintenance supplement under 15 V.S.A. §661(a), to mitigate the lower standard of living for the children when residing with their mother. Finally, the court awarded JoAnne over $16,000 in attorney's fees. James then appealed to this Court.

I.

The United States Constitution requires that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, §1. Full faith and credit of the Texas divorce judgment, however, is conclusive in Vermont only if Texas had jurisdiction to render the judgment. *Williams v. North Carolina*, 325 U.S. 226, 229 (1945).

There is no question that the Texas court had jurisdiction to end the parties' marriage, and that the divorce is entitled to full faith and credit. "[E]ach state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent." *Williams v. North Carolina*, 317 U.S. 298, 298-99 (1942).

Under the doctrine of "divisible divorce," however, issues other than the dissolution of the marriage are severed from the divorce action when the court does not have personal jurisdiction over one spouse; in that case, the judgment does not resolve issues other than the marital status of the parties. *Conlon by Conlon v. Heckler*, 719 F.2d 788, 795-96 (5th Cir. 1983); 1 H. Clark, *The Law of Domestic Relations in the United States*, §13.4 (2d Ed. 1987); see also *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418-19 (1957) (where wife not subject to Nevada jurisdiction, Nevada court could not extinguish right to support in another state even though not reduced to judgment in the other state); *Estin v. Estin*, 334 U.S. 541, 549 (1948) (Nevada court lacking personal jurisdiction over wife could not terminate husband's preexisting obligation for support ordered in another state). We find the divisible-divorce concept applicable here; accordingly if the Texas court was without personal jurisdiction over JoAnne, we need not give its judgment, other than that ending the parties' marital status, binding effect in Vermont.

In *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the United States Supreme Court set out the constitutional test for a court to acquire personal jurisdiction over a nonresident defendant. In addition to an enabling law conferring personal jurisdiction (commonly called a "long-arm" statute), the defendant must "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). A determination whether "minimum contacts" exist rests on a number of factors: the interests of the plaintiff and the forum State in

proceeding with the action there; the nature and quality of the defendant's activity within that state; and whether it is fair and reasonable to require the defendant to conduct a defense within the plaintiff's choice of forum. *Kulko v. California Superior Court*, 436 U.S. 84, 92 (1978).

The Texas long-arm statute, 1 Tex. Fam. Code Ann. §3.26(a)(2), provides that the Texas divorce court may exercise personal jurisdiction over a nonresident if "there is any basis consistent with the constitutions of this state and the United States." Thus, the Texas court could exercise personal jurisdiction over JoAnne to the fullest extent due process will allow. *Hoffman v. Hoffman*, 821 S.W.2d 3, 4-5 (Tex. Ct. App. 1992); *Kramer v. Kramer*, 668 S.W.2d 457, 458 (Tex. Ct. App. 1984).

On the facts of this case, we conclude that JoAnne Poston's contacts with Texas are so minimal as to fail the due process test. Although JoAnne resided in Texas for three years during the early 1970's and bore her first child there, at the time of separation in 1987, Vermont was the parties' domicile. There is nothing in the record showing that JoAnne has had any other ties to Texas, and James has not contended otherwise. Subjecting her to personal jurisdiction in Texas under these circumstances was not reasonable, and Texas decisional law supports our conclusion. See, e.g., *Cunningham v. Cunningham*, 719 S.W.2d 224, 228-29 (Tex. Ct. App. 1986) (no personal jurisdiction where former Texas resident moved from state, severed all ties with state, and only contact was one attempted visit with his child approximately one year after move and shortly before Texas' attempt to establish jurisdiction over him); *Ford v. Durham*, 624 S.W.2d 737, 739-40 (Tex. Ct. App. 1981) (several visits over eight-year period to child in Texas

and at least twelve business trips insufficient to subject father to personal jurisdiction in Texas for purposes of modification of New Mexico child support order).[1] Thus, despite the local Texas court's assertion otherwise, it lacked jurisdiction to conclusively determine JoAnne's rights and we need not give its judgment binding effect, beyond the dissolution of the parties' marriage.

II.

James further submits that in Vermont, apart from due process concerns, the family court could not award JoAnne maintenance because, as he reads 15 V.S.A. §752, the court may make orders for maintenance only to a "spouse." Because James and JoAnne were no longer married at the time the Vermont court ordered maintenance, James argues, its award was barred by the statute.

Section 752 of Title 15 grants the court the power to order "either spouse" to make maintenance payments to the other spouse under certain conditions. This Court has recognized that the purpose of spousal maintenance is to rectify " 'inequality between the parties' financial positions.' " *Klein v. Klein*, 150 Vt. 466, 473, 555 A.2d 382, 386 (1988) (quoting *Buttura v. Buttura*, 143 Vt. 95, 99, 463 A.2d 229, 231 (1983)). Although the statutory language specifically refers to "spouse," we must construe the statute reasonably in context and in light of its purposes. Here, we do not believe the legislature

[1] Nor do we find personal jurisdiction over JoAnne under §11.051 of the Texas Family Code, which is applicable in those suits affecting the parent-child relationship. Although a literal reading appears to confer jurisdiction, "it must also be determined that such jurisdictional facts are constitutionally sufficient to meet basic requirements of due process." *Dillon v. Medellin*, 627 S.W.2d 737, 740 (Tex. Ct. App. 1981).

intended "spouse" to mean anything more than a party to the marriage. The Vermont court, not the Texas court, had jurisdiction to decide the issue of maintenance. Further, this Court is not prohibited from remanding to the trial court an issue of maintenence, even though the parties remain divorced. See *Semprebon v. Semprebon*, 157 Vt. 209, 216, 596 A.2d 361, 365 (1991) (issue of maintenance remanded after marriage ended where family court made no ruling on plaintiff's request for maintenance); *Klein*, 150 Vt. at 472, 555 A.2d at 386 (cause remanded to award maintenance, although divorce undisturbed).

James directs our attention to *Grant v. Grant*, 136 Vt. 9, 383 A.2d 627 (1978), and *Loeb v. Loeb*, 118 Vt. 472, 114 A.2d 518 (1955), in support of the proposition that a Vermont court cannot award maintenance in a separate action, except by way of modification, once the marriage has been dissolved. The *Grant* court considered whether alimony could be awarded in Vermont where the parties were divorced in the Virgin Islands and both parties had appeared personally in the Virgin Islands court. The foreign court's failure to award alimony was not the result of its lack of power to do so. Because the issue of alimony was considered by the foreign court, this Court concluded that the divorce decree was res judicata and reconsideration of alimony in Vermont was precluded. 136 Vt. at 13, 383 A.2d at 629. Here, in contrast, the Texas court did not acquire personal jurisdiction over JoAnne. Thus, the Texas action is not subject to the doctrine of res judicata.

Although the *Loeb* court stated that an order ending the marriage "terminates the wife's right to an award of separate maintenance," 118 Vt. at 483, 114 A.2d at 526, we cannot agree that once a marriage is validly ended,

maintenance or support may not be ordered in a separate action thereafter. We note that the law concerning the award of maintenance has not remained stagnant since the *Loeb* decision. At present, a majority of states recognize that a suit for maintenance may be brought after termination of the marriage. 1 H. Clark, *supra*, §13.4. Further, this Court has implicitly recognized that a Vermont court might have ancillary jurisdiction to decide issues of property division, maintenance, and child support even though a foreign divorce judgment may be entitled to full faith and credit. See *Driver v. Driver*, 148 Vt. 560, 562-63, 536 A.2d 557, 559 (1987) ("other issues concerning property division, maintenance, and child support remained over which the Vermont court might have ancillary jurisdiction even if the Massachusetts judgment is entitled to full faith and credit"). Therefore, we hold that the termination of a marriage does not automatically bar a later separate maintenance award.[2]

Affirmed.

FOR THE COURT:

J. MORSE
Associate Justice

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[2] Following the court's decision, James was found twice in contempt for failure to pay child support, the child support maintenance supplement, and maintenance in accordance with the terms of the judgment. James also appealed these orders. We find no error in the trial court's contempt orders because James' attack on the orders depended entirely on his challenge to the underlying judgment for maintenance and child support.

Decree of Divorce of the 78th District Court of Wichita County, Texas Dated March 20, 1990

IN THE 78TH DISTRICT COURT
OF
WICHITA COUNTY, TEXAS

No. 134,450-B

IN THE MATTER OF THE MARRIAGE OF

JAMES GORDON POSTON
AND
JO ANNE POSTON

DECREE OF DIVORCE

On the 15th day of March, 1990, came on to be heard the Petition for Divorce hereto filed by JAMES GORDON POSTON on the 26th day of May, 1989.

The Petitioner, JAMES GORDON POSTON, Social Security Number 414-80-7523, Texas Driver's License Number 11005375, appeared in person and by his counsel of record, Jack G. Banner. The Respondent did not appear in person nor by counsel.

The record of testimony was duly reported by Michael Terry, official court reporter, of the 78th Judicial District Court. The Court considered the pleadings, the official file of this cause and received evidence concerning all pertinent matters incident to this action. Petitioner filed no request for a jury and all questions of law and of fact are submitted to the Court for determination.

The Court FINDS that:

1. The Respondent, Jo Anne Poston, Social Security Number 409-74-8867, Vermont Driver's License Number 409748867, was duly served with citation by certified mail, return receipt requested, issued by the District Clerk's office of Wichita County, Texas;

2. The Respondent, Jo Anne Poston, personally signed for the letter containing the petition and citation as contemplated by Rules 103, 106 and 107 of the Texas Rules of Civil Procedure;

3. The Citation has been on file with the District Clerk's office for a period, far in excess of the ten (10) day minimum, prescribed by Rule 107 of the Texas Rules of Civil Procedure;

4. Although the Respondent, Jo Anne Poston, has been duly and properly cited according to the Texas Rules of Civil Procedure that she has not appeared and wholly made default;

5. The Pleadings of the Petitioner are in due form and contain all of the allegations, information and prerequisites required by law;

6. This Court has sole and exclusive jurisdiction over this cause of action and of the parties and that more than 60 days have elapsed since the date the suit was filed;

7. Prior to the filing of his Petition for Divorce, the Petitioner has been a bona fide resident and domiciliary of the State of Texas for a period well in excess of the six months jurisdictional requirement and a resident of Wichita County, Texas, for a period well in excess of the 90 day period required for purposes of establishing venue;

8. The marriage has become insupportable to Petitioner and the legitimate ends of this marriage have been destroyed; and

9. There is no reasonable expectation of reconciliation.

IT IS ORDERED AND DECREED that JAMES GORDON POSTON, Petitioner, and JO ANNE POSTON, Respondent, are now divorced and the marriage between them is fully dissolved.

The Court FINDS that the Petitioner and the Respondent are the parents of the following children:

NAME: RACHEL ELIZABETH POSTON
SEX: FEMALE

BIRTHPLACE: Dallas, Texas BIRTHDATE 7-20-73

SOCIAL SECURITY NUMBER: 427-43-3085

NAME: ELLEN ASHLEY POSTON SEX: Female

BIRTHPLACE: Panama City, Florida

BIRTHDATE: 5-22-75

SOCIAL SECURITY NUMBER: 427-43-3212

The Court FINDS that no other children are expected and none have been adopted.

The Court, having considered the circumstances of the parents and of the children of the marriage, FINDS that the following orders are in the best interests of the children:

IT IS ORDERED AND DECREED that JO ANNE POSTON, is appointed Sole Managing Conservator of the children.

IT IS ORDERED AND DECREED that the Sole Managing Conservator shall have the following rights, privileges, duties and powers, subject to the rights, privileges, duties and powers of any possessory conservator named in this decree:

a. The right to have physical possession, to direct the moral and religious training and to establish the legal domicile of the children;

b. The duty of care, control, protection and reasonable discipline of the children;

c. The duty to provide the children with clothing, food, shelter and education;

d. The right to the services and earnings of the children;

e. The power to consent to marriage, to enlistment in the Armed Forces of the United States, and to medical, psychiatric and surgical treatment;

f. The power to represent the children in legal action and to make such other decisions of substantial legal significance concerning the children. Except when a guardian of either child's estate or a guardian or attorney ad litem of either child's estate has been appointed, the Sole Managing Conservator may exercise her power as an agent of either child to act in relation to either child's estate if the action is required of either child by any State, the United States or a foreign government; and

g. The power to receive and give receipt for periodic payments for the support of either child and to hold or disburse these funds for the benefit of the children.

IT IS ORDERED AND DECREED that JAMES GORDON POSTON is appointed Possessory Conservator of the children.

IT IS ORDERED AND DECREED that the Possessory Conservator shall have the following rights, privileges, duties, powers during each period of possession:

a. The duty of care, control, protection and reasonable discipline of the children;

b. The duty to provide the children with clothing, food and shelter;

c. The power to consent to medical and surgical treatment during an emergency involving an immediate danger to the health and safety of the children;

d. The right to access to medical, dental and educational records of each child to the same extent as the Sole Managing Conservator;

e. The right to consult with any treating physician or dentist of either child; and

f. The right to consult with school officials concerning the children's welfare and educational status, including school activities.

The Court FINDS that the children of this marriage are enrolled in the Stanstead College, private school, located in Rock Island, Quebec, Canada. The Court finds that the annual tuition for each child to attend such school is approximately Five Thousand Dollars ($5,000.00) per year. The Court FINDS that the Petitioner, JAMES GORDON POSTON, has agreed to continue to be financially responsible for the payment of

such private school tuition as a part of his continuing commitment toward the health and welfare of his children. The Court FINDS that the agreement of the Petitioner with regard to his commitment towards his childrens' education is in their best interests and approves the agreement of the Petitioner. Court further ORDERS the Petitioner to pay, when due, the tuition of the children at Stanstead College, so long as they regularly attend such school and have not attained 19 years of age.

The Court FINDS that because of the commitment of the Petitioner towards the continued educational development of his children and the distance separating the Petitioner and childrens' school customary abode that unusual circumstances exist which make the "standard possession order" for possessory conservators unworkable. The Court finds that pursuant to Section 14.033 (m) of the Texas Family Code that the following orders shall issue with respect to the times during which JAMES GORDON POSTON shall have possession of the children of the marriage:

The Managing Conservator is ORDERED to turn over the children or make them available for transportation for all periods of visitation.

IT IS ORDERED AND DECREED that JAMES GORDON POSTON shall have possession of the children at any and all times as the parties may mutually agree and, failing mutual agreement, possession and visitation shall be as follows:

a. *Christmas Vacation.* In each even-numbered years from 6 P.M. on last school day before Christmas school vacation until Noon on December 26th; and in odd-numbered years from Noon on December 26th to 6 P.M. on the day before school resumes;

b. *Thanksgiving Vacation.* In each odd-numbered years from 6 P.M. on Wednesday preceding Thanksgiving until 6 P.M. on Sunday following Thanksgiving;

c. *Spring School Vacation.* During annual spring school vacation from 6 P.M. on day before school recesses until 6 P.M. on the day before school resumes after vacation;

d. *Summer Vacation.* For a period of six (6) weeks each summer which may be broken into not more than two (2) separate periods with each period of at least fourteen (14) days duration. Notice to be given by May 1 of each year specifying dates and failure to give notice means a period of 42 consecutive days from 6 P.M. on June 15 and ending at 6 P.M. on July 27.

IT IS ORDERED that the Possessory Conservator shall SURRENDER the children to the Managing Conservator by providing the means for their travel to her regular place of abode at the termination of such period of visitation. The Court FINDS that the Petitioner has agreed and will send the Respondent prepaid airline tickets for the childrens' use to facilitate visitation. IT IS ORDERED Respondent shall deliver the children to the Burlington Airport in Vermont or such other airport providing scheduled commercial airline service near their regular abode on the beginning date of each period of visitation and that the Petitioner shall deliver the children to DFW Airport or some similar airport at the conclusion of each period of possession.

The Court has taken into consideration the costs associated with the travel arrangements for reasonable visitation and the benefits obtained thereby in

determining and setting the Court's Order on Child Support. The Court FINDS that the Petitioner, JAMES GORDON POSTON, is obligated to support the children of the marriage. The Court finds that the Petitioner is currently paying the tuition for each child to attend private school in Rock Island, Quebec, Canada and that the Petitioner has agreed to continue to fund such schooling and the Court finds that his agreement to provide for his childrens' education is in the best interests of the children.

The Court FINDS that the Petitioner has purchased an automobile for use of the children of the marriage, the title of which is jointly in the names of Petitioner and Rachel Elizabeth Poston. Petitioner has made all monthly payments towards the purchase of such car, as well as insurance and taxes thereon. The Court has taken the cost and expense of providing such transportation for the use and benefit of the children into account in settling child support. The Petitioner is ORDERED to make available some reasonable automobile, the present automobile or a replacement, to the children of the marriage, the last or terminating date of such obligation shall be identical to the terminating events set out in subparagraphs 1 through 6 of the paragraph ordering child support.

The Court further FINDS that the Petitioner, JAMES GORDON POSTON, has provided and will continue to provide the major medical, health and hospitalization insurance on each child of the marriage and that the Petitioner will pay the deductible cost associated with claims filed on each child on the policies of major medical, health and hospitalization insurance as well as that portion more commonly known as the co-insurance clause. The Court finds that the agreement of the

Petitioner to provide such benefits to the children is in their best interests and the Court takes notice of such payments as one of the evidentiary factors to be considered in settling the amount of child support ordered herein.

The Court FINDS that the Petitioner has provided for the college education of the children of the marriage by accumulating the sum of Seventy Thousand Dollars ($70,000.00) and held by the Respondent as Custodian under the Uniform Gift to Minors Act in an interest-bearing account for the educational use of the children. Additionally, Respondent is Custodian of mutual fund accounts for the use and benefit of each child of the marriage in excess of the sum of One Thousand Dollars ($1,000.00) each.

IT IS THEREFORE ACCORDINGLY ORDERED, ADJUDGED AND DECREED that JAMES GORDON POSTON is obligated to pay and shall pay to JO ANNE POSTON child support of Two Thousand Five Hundred Dollars ($2,500.00) per month, with the first such payment due and payable on the 5th day of April, 1990, and a like payment of Two Thousand Five Hundred Dollars ($2,500.00) on the 5th day of each succeeding month thereafter until the earliest occurrence of one of the following events:

1. Any child reaches the age of 18 years, provided that, if the child is fully enrolled in an accredited secondary school in a program leading toward a high school diploma, the periodic payments shall continue to be due and paid until the end of the school year in which the child graduates;

2. Any child marries;

3. Any child dies;

4. Any child's disabilities are otherwise removed for general purposes;

5. Any child is otherwise emancipated; or

6. Further Order modifying this child support.

Thereafter, JAMES GORDON POSTON, Petitioner, is ORDERED AND DECREED to pay to JO ANNE POSTON child support of Two Thousand Dollars ($2,000.00) per month with the first payment being due and payable on the same day of each month until the date of the next occurrence of one of the events specified above.

The Court FINDS that good cause exists that no order for withholding from earnings for child support be delivered to the employer of JAMES GORDON POSTON. ACCORDINGLY, IT IS ORDERED AND DECREED that all child support payments due and payable under this Order shall be made through the Family court Services Division of Wichita County, Texas, and thereafter, promptly remitted by that agency to JO ANNE POSTON for the support of the children.

IT IS FURTHER ORDERED AND DECREED that JAMES GORDON POSTON shall pay an initial service fee of forty dollars ($40.00) to establish the child support payment account with Family Court Services of Wichita County, Texas, and shall thereafter pay, as due the sum of $2.50 per month to maintain said account as long as child support is due and payable under this Order. Failure of the Petitioner to pay these maintenance fees when due and payable may result in a finding of contempt of court against the Petitioner.

FAILURE TO OBEY A COURT ORDER FOR CHILD SUPPORT OR FOR POSSESSION OF OR ACCESS TO A CHILD MAY RESULT IN FURTHER LITIGATION TO ENFORCE THE ORDER, INCLUDING CONTEMPT OF COURT. A FINDING OF CONTEMPT MAY BE PUNISHED BY CONFINEMENT IN JAIL FOR UP TO SIX MONTHS, A FINE OF UP TO $500 FOR EACH VIOLATION, AND A MONEY JUDGMENT FOR PAYMENT OF ATTORNEY'S FEES AND COURT COSTS.

FAILURE OF A PARTY TO MAKE A CHILD SUPPORT PAYMENT TO THE PLACE AND IN THE MANNER REQUIRED BY A COURT ORDER MAY RESULT IN THE PARTY NOT RECEIVING CREDIT FOR MAKING THE PAYMENT.

FAILURE OF A PARTY TO PAY CHILD SUPPORT DOES NOT JUSTIFY DENYING THAT PARTY COURT-ORDERED POSSESSION OF OR ACCESS TO A CHILD. REFUSAL BY A PARTY TO ALLOW POSSESSION OF OR ACCESS TO A CHILD DOES NOT JUSTIFY FAILURE TO PAY COURT-ORDERED CHILD SUPPORT TO THAT PARTY.

EACH PARTY WHO IS A PARTY TO THIS ORDER OR DECREE IS ORDERED TO NOTIFY THE CLERK OF THIS COURT WITHIN TEN DAYS AFTER THE DATE OF ANY CHANGE IN THE PARTY'S CURRENT RESIDENCE ADDRESS, MAILING ADDRESS, HOME TELEPHONE NUMBER, NAME OF EMPLOYER, ADDRESS OR PLACE OF EMPLOYMENT, OR WORK TELEPHONE NUMBER. THE DUTY TO FURNISH THIS INFORMATION TO THE CLERK OF THE COURT CONTINUES AS LONG AS ANY PERSON, BY VIRTUE OF THIS ORDER OR DECREE, IS UNDER

AN OBLIGATION TO PAY CHILD SUPPORT OR IS ENTITLED TO POSSESSION OR ACCESS TO A CHILD. FAILURE TO OBEY THE ORDER OF THIS COURT TO PROVIDE THE CLERK WITH THE CURRENT MAILING ADDRESS OF A PARTY MAY RESULT IN THE ISSUANCE OF A CAPIAS FOR THE ARREST OF THE PARTY IF THAT PARTY CANNOT BE PERSONALLY SERVED WITH NOTICE OF A HEARING AT AN ADDRESS OF RECORD.

As additional child support, IT IS ORDERED AND DECREED that as long as child support is due and payable under the terms of this Order that JAMES GORDON POSTON shall maintain in full force and effect and at his sole cost and expense the major medical, health and hospitalization insurance policy now providing coverage for the children. IT IS FURTHER ORDERED AND DECREED that as long as child support is due and payable under the terms of this Order that JAMES GORDON POSTON shall be solely responsible for the payment of all medical expenses incurred by or on behalf of the children which are not paid by some form of insurance.

The Court FINDS that the Petitioner, JAMES GORDON POSTON, and the Respondent, JO ANNE POSTON, separated and ceased to live together as husband and wife about the 1st day of October, 1987. The Court FINDS that as a part of their decision to separate the parties agreed to fully, finally and forever divide the partition the property which they had then accumulated and that the parties further agreed that any property thereafter acquired by either of them regardless of the means or method of acquisition would forever remain the sole and separate property of the person by

whom such property was acquired. The Court further finds that the parties carried forth and fully performed their agreement and that the Petitioner and Respondent sold their residence and equally divided the net sales proceeds between them; that the Petitioner further purchased a SAAB automobile for the exclusive use and benefit of the Respondent and has, at all relevant times since, made and continues to make payments for the Respondent's continued exclusive use and ownership of such motor vehicle; that the Respondent received the overwhelming amount in value and quantity of the parties' accumulated personal furniture, furnishings, goods and other items; that the Respondent has since acquired other items to which the Petitioner makes no claim whatsoever; and, that following the implementation of the parties' agreement to separate and forever divide and partition their existing and hereinafter acquired property, the Petitioner moved to the State of Texas.

The Court FURTHER FINDS that the contractual agreement of the Petitioner and Respondent to fully, finally and forever divide, allocate and partition the properties held by them at the time of separation was fully performed by both the Petitioner and Respondent and that the Respondent received not only the full and complete benefit of her contractual agreement but that she received benefits substantially in excess of one-half (1/2) of the property which was then in existence.

The Court FINDS that the Respondent is a registered nurse with the capacity to work and be compensated therefor. Since October 1, 1977, Respondent has been employed and has received substantial sums in support from Petitioner. All such matters are considered by the Court in determining a fair and just apportionment of property.

The Court FINDS that upon his arrival in the State of Texas the Petitioner began the practice of his medical profession. The Court FINDS that the Petitioner conducts his medical practice as a member of a recently formed Professional Association with other well-established and known anesthesiologists. By law, the stock in a Professional Association is non-saleable or transferrable. By the terms of such Professional Association charter, should Petitioner die or withdraw, he is entitled only to the amount due for collected fees which have not been distributed. Further, Petitioner could be compelled to withdraw and no longer associated by a vote of the Association. A shareholder who ceases to practice anesthesiology with the Association will not be paid any compensation for accrued goodwill. The Court FINDS that the total value of the Petitioner's medical practice at the time of the final hearing herein is Ten Thousand Dollars ($10,000.00) and Nine Thousand Dollars ($9,000.00) which is attributable to the professional goodwill which has attached to the Petitioner by virtue of the confidence in which the general and medical public views the professional skill and ability of the Petitioner. The Court FURTHER FINDS that such confidence would not exist, but would wholly cease to be in effect, upon the death, retirement or disablement of the Petitioner such that professional goodwill, standing alone, possesses neither value nor constitutes an asset, separate and apart from the unique abilities of the Petitioner.

Accordingly, the Court FINDS that such professional goodwill does not constitute property to be divided upon the divorce of the parties hereto as contemplated by Section 363 of the Texas Family Code. IT IS THEREFORE ACCORDINGLY ORDERED, ADJUDGED AND DECREED that the net value of the

medical practice of the Petitioner, JAMES GORDON POSTON, is found to be in the sum of One Thousand Dollars ($1,000.00).

The Court FINDS that both Petitioner and Respondent have been gainfully employed as professionals during the year 1989 and 1990 to date. That as a result of such employment, there have been earnings and receipts of funds upon which taxes must be paid. It would be fair and equitable for the Respondent and the Plaintiff to file tax returns separately and each pay all tax due on the taxable income attributable to such party. This is required inasmuch as the parties are domiciled in different states and there may be state taxes due on earnings or income within such state. It is therefore ORDERED that Petitioner and Respondent file separate tax returns for the tax year 1989 and subsequent tax years. That Petitioner and Respondent must individually pay all taxes due, owing or payable on the taxable income and attributable to such party. The dependency status of the children for tax deduction purposes shall be determined by the Internal Revenue Code provisions applicable in any specific tax year. The Petitioner is ORDERED to pay and be solely responsible for any additional taxes not heretofore paid to the Internal Revenue Service for the tax year 1988 and before. The Court has taken such potential tax liability into account in awarding the Respondent a monetary judgment against Petitioner.

The Court FINDS that Petitioner has separate policies of insurance payable on his life and that Respondent has separate policies of insurance payable on her life. The Petitioner has designated the children of the marriage as beneficiaries, in trust, of his insurance policies and there is no proof as to the present designated beneficiary on

the Respondent's policies of insurance. It is therefore ORDERED that the policies of insurance now in force and effect on the life of Petitioner be and are hereby ADJUDGED his separate property and the policies of insurance on the life of Respondent be and are hereby ADJUDGED her separate property.

The Court FINDS that the Petitioner has approximately Sixty Thousand Dollars ($60,000.00) in retirement or IRA funds and that the Respondent has similar accounts, the exact amount of which cannot be ascertained as a result of the Respondent's default. The Court will, nonetheless, consider these facts in weighing the division of property between the parties. It is therefore ORDERED that the present retirement and IRA accounts or other retirement benefits which may accrue in the future, together with all increases thereof, proceeds therefrom or any rights related thereto, shall be the sole and separate property of Petitioner and all such similar funds standing in the name of Respondent shall be her sole and separate property and are hereby so vested in the Respondent.

The Court FINDS that the Respondent has the possession of a Visa charge card and a MasterCard charge card, which are billed directly to Petitioner. That it would be inequitable to require Petitioner to be further obligated for future or additional charges by the Respondent. Sufficient time has elapsed for the Respondent to have acquired credit cards in her own name and for her own account, should she have desired to do so. It is accordingly ORDERED that the Petitioner is permitted to cancel such credit cards, but pay charges incurred prior to date of cancellation, and shall, upon cancellation, notify the Respondent in writing.

The Court FINDS that there exists two (2) joint bank accounts over which the Respondent has exercised sole and exclusive control and management for the last two (2) years. Respondent has caused sums of money to be deposited therein which earn interest of approximately Two Thousand Dollars ($2,000.00) per year and utilized such interest, but the same was taxed against the Petitioner. It is therefore ORDERED that the Petitioner be allowed to close or assign any right, title or interest in such accounts to Respondent and not be further obligated thereon for taxation or otherwise.

The Court FINDS that the following is a just and right division of the parties' marital estate, having due regard for the rights of each party and the children of the marriage.

It is therefore ORDERED AND DECREED that the estate of the parties is divided as follows:

1. The Petitioner is awarded the following as Petitioner's sole and separate property and Respondent is divested of all right, title, interest and claim in and to such property:

   a. All household furniture, furnishings, fixtures, goods, appliances and equipment in the sole possession of or subject to the control of Petitioner;

   b. All clothing, jewelry and other personal effects in the possession of or subject to the sole control of Petitioner;

   c. Any and all sums of cash in the possession of or subject to the sole control of Petitioner, including money on accounts in banks, savings institutions or other banking institutions which stand in

Petitioner's name or from which Petitioner has the sole right to withdraw funds or which are subject to Petitioner's sole control;

d. All prepaid insurance, utility deposits, keys, warranties, service contracts pertaining to or used in connection with the property awarded to the Petitioner herein;

e. That the Petitioner shall be solely responsible for any liability, notes, debts or obligations incurred by him, standing in his own name, or for which he has been found legally responsible and the Respondent shall be absolved of the liability thereon; and

f. The Petitioner possesses an option to purchase a residence in Wichita Falls, Texas, but such option has not been exercised. Even if all lease payments were applied toward purchase, the Court FINDS there is not net equity because the purchase price far exceeds fair market value.

2. The Respondent is awarded the following as Respondent's sole and separate property and Petitioner is divested of all right, title, interest and claim in and to such property:

a. All household furniture, furnishings, fixtures, goods, appliances and equipment in the sole possession of or subject to the control of Respondent;

b. All clothing, jewelry and other personal effects in the possession of or subject to the sole control of Respondent;

c. Any and all sums of cash in the possession of or subject to the sole control of Respondent, including money on accounts in banks, savings

institutions or other banking institutions which stand in Respondent's name or from which Respondent has the sole right to withdraw funds or which are subject to Respondent's sole control;

d. All prepaid insurance, utility deposits, keys, warranties, service contracts pertaining to or used in connection with the property awarded to the Respondent herein;

e. That the Respondent shall be solely responsible for any liability, notes, debts or obligations incurred by her, standing in her own name, or for which she has been found legally responsible and the Petitioner shall be absolved of the liability thereon; and

f. That Respondent shall have as her sole and separate property, a 1988 SAAB 9000S automobile, which is currently in her possession. There remains sums due and owing on the original mortgage of such vehicle to the Chittenden Bank of Burlington, Vermont. The Petitioner shall be solely liable therefor and shall pay the same in accord with the terms of the original borrowing. The Petitioner shall promptly transfer and assign all right, title or interest he possesses in such automobile to the Respondent.

The Court additionally FINDS that all funds and assets in the Petitioner's sole possession accrued and were earned in the State of Texas and all taxes due thereon were or are to be paid in Texas. That both Petitioner and Respondent are professionally trained and licensed and physically capable of working full-time and thereby being self-sufficient from their individual earnings. The Court further FINDS that Respondent has

voluntarily chosen to work only part-time in the past and no reason nor necessity exists to order future monthly payments for support to the Respondent from Petitioner.

For the purpose of a just and right division of property as made in this Decree, it is further ORDERED AND DECREED that Respondent, JO ANNE POSTON, recover of and from Petitioner, JAMES GORDON POSTON, a judgment in the sum of Thirty Thousand Dollars ($30,000.00). The accrual date or date upon which the Judgment amount is due shall be thirty (30) days after this Judgment has become final and non-appealable and has not been collaterally attacked for the purpose of setting same aside. No payment of such Judgment shall accrue nor become payable until such conditions precedent have been fully satisfied.

It is ORDERED that each party shall be responsible for his or her own attorney's fees, costs or expense incurred as a result of legal representation in this case, but that all costs of Court in this cause be and are hereby taxed against the Petitioner.

SIGNED AND ENTERED on the 2nd day of March, 1990.

KEITH NELSON
Keith Nelson
District Judge

Findings of Fact and Conclusions of Law of the Orleans Family Court, Orleans County, Vermont dated February 28, 1992

STATE OF VERMONT

ORLEANS COUNTY, SS.

ORLEANS FAMILY COURT

DOCKET NO. S60-89-OsF

JOANNE M. POSTON

VS.

JAMES G. POSTON

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court on July 25, 1991 and September 18, 1991 for a Hearing on the Merits, the Honorable Shireen Avis Fisher presiding. Based on the evidence and the arguments presented, the Court finds as follows:

FINDINGS OF FACT

1. The Plaintiff, who is 45 years of age, was born on September 14, 1946.

2. The Defendant, who is 44 years of age, was born on November 23, 1946.

3. The Plaintiff resides in the Town of Newport, County of Orleans and State of Vermont.

4. The Defendant resides in the City of Wichita Falls, County of Wichita, and State of Texas.

5. Although represented by counsel at the time of the final hearing, the Defendant did not appear and testify.

6. The parties were married in Memphis, Tennessee on June 12, 1971 and have two children: Rachel, who was born on July 20, 1973, and Ellen, presently a minor, who was born on May 22, 1975.

7. The parties later resided together in Morgan, Vermont. They separated on October 17, 1987.

8. On January 6, 1991, this Court, Judge Cheever presiding, made findings of fact on Defendant's motion to dismiss. This Court affirms and adopts those findings, thus being no new or additional evidence introduced to the contrary:

> "1. Plaintiff has been a resident of the State of Vermont since July, 1982 and continues to be a resident of Vermont. The parties' two children, Rachel and Ellen have resided in Vermont from July, 1982 to the present time. Plaintiff resided in Texas with defendant from 1971 to 1974. Plaintiff conceived and gave birth to Rachel while residing in Texas.
>
> "2. Defendant was a Vermont resident from July, 1982 until he moved to Texas in 1988. He is now a resident of Texas.
>
> "3. Defendant filed a petition for divorce in Texas on May 26, 1989. The plaintiff was served with a citation by certified mail, return receipt requested. The citation was mailed to the plaintiff's Vermont address by the District Clerk's Office of Wichita County, Texas on July 14, 1989. The plaintiff personally signed for the letters containing the petition and citation.

"4. On July 14, 1989, plaintiff filed a complaint in the Orleans Superior Court requesting a divorce, a suitable portion of the property, suitable alimony and child support. The complaint was personally served on the defendant in Derby, Vermont on August 28, 1989.

"5. On March 28, 1990 the plaintiff filed a Motion to Amend the complaint. A second Motion to Amend was filed on September 6, 1990.

"6. Defendant filed a Motion to Dismiss on May 2, 1990 and renewed the Motion to Dismiss on August 6, 1990. Defendant objects to plaintiff's Motion to Amend filed on September 6, 1990.

"7. A Decree of Divorce *In the Matter of the Marriage of James Gordon Poston and Joanne Poston,* Docket No. 134, 450-B in the 78th District Court of Wichita County, Texas, was signed and entered on March 20, 1990 by District Judge Keith Nelson.

"8. Plaintiff concedes that the Texas court has granted the defendant a divorce and that the parties are divorced.

"9. In the divorce decree, the Texas court found that the plaintiff had been duly served with the citation and that she has not appeared and was not in default. The Court found that it had jurisdiction over the cause of action. It also found it had jurisdiction over the defendant because he was a resident and domiciliary of Texas for more than six months and that jurisdiction over the plaintiff has been obtained under the Texas long arm statute. The Court also determined it had jurisdiction over the parties' children pursuant to 2 Tex. Fam. Code Ann., Sec. 11.051.

"10. The Texas divorce decree appointed the plaintiff as the sole Managing Conservator of the children and the defendant as possessory Conservator. It approved defendant's agreement to pay for the children's tuition at Stanstead College as long as they regularly attended such school and had not attained 19 years of age. The decree also set forth the schedule for defendant's visitation with the children.

"11. The decree also order defendant to pay plaintiff the sum of $2,500.00 a month for child support until the earliest occurrence of one of the following events:

1. Any child reaches the age of 18 years, provided that, if the child us fully enrolled in an accredited secondary school in a program leading toward a high school diploma, the periodic payments shall continue to be due and paid until the end of the school year in which the child graduates;

2. Any child marries;

3. Any child dies;

4. Any child's disabilities are otherwise removed for general purposes;

5. Any child is otherwise emancipated; or

6. Further Order modifying this child support.

Thereafter, the defendant was ordered to pay $2,000.00 a month until the date of the next occurrence of one of the events set out above.

"12. The Court also found that the plaintiff and defendant are professionally trained and licensed and physically capable of working full-time and being self-sufficient from their individual earnings.

> The Court further found that the plaintiff has voluntarily chosen to work only part-time in the past and that no reason nor necessity existed to order future monthly payments for support to plaintiff from defendant."

9. A final uncontested hearing was scheduled by the clerk of the court in Vermont in this matter on March 13, 1990. Counsel for the plaintiff and the defendant indicated to the clerk that this matter would take more time than had been allowed. Consequently, the hearing was continued.

10. Just before the final hearing in Texas, the defendant had asked the plaintiff not to proceed in Vermont without his knowing.

11. In October of 1989, defendant's then counsel in Vermont, had requested plaintiff not to proceed with a temporary hearing, without first notifying him.

12. The plaintiff is presently employed as a registered nurse in the operating room in North Country Hospital in Newport, Vermont.

13. The defendant is currently employed as an anesthesiologist at Respiratory Care Services, in Wichita Falls, Texas.

14. The plaintiff's gross income in 1990 was $21,656.26 of which $20,168.63 was from wages and $1,487.63 was from interest.

15. The defendant's gross income in 1990 was $441,598.00 of which $434,000.00 came from the practice of medicine.

16. The plaintiff's present financial assets consist of a savings account in the amount of $30,000.00 and an IRA account in the amount of $15,000.00.

17. The defendant's present financial assets consist of a Merrill Lynch account in the approximate amount of $120,000.00 and an IRA account in the approximate amount of $63,000.00.

18. The plaintiff has been the primary caretaker of the minor child, Ellen, since the child's birth.

19. The parties met in December of 1970 while the plaintiff was working as a registered nurse in Toby Hospital in Memphis, Tennessee and while the defendant was finishing his third year of medical school at the University of Tennessee.

20. At the time of the parties' marriage in 1971, the plaintiff had been employed for four years as a registered nurse.

21. Following the parties' marriage in June of 1971, the defendant graduated from medical school.

22. The parties then moved to Dallas, Texas where they lived for three years. During the three year period, the defendant completed his internship and residency in pediatric medicine.

23. For the first two years of their marriage, the plaintiff was employed as a registered nurse in Dallas, Texas.

24. Following the birth of the parties' first child in July of 1973, the parties agreed that the plaintiff should stop working and become a full-time homemaker and mother.

25. In July of 1974, the parties moved to Zenia, Ohio, where the defendant completed nine months of military service.

26. Shortly before the birth of the parties' second child, the parties moved to Panama City, Florida, where the defendant completed his second year of military service in the Air Force.

27. The parties' second child was born in May of 1975.

28. Following the defendant's release from the Air Force in 1976, the defendant decided that he no longer wanted to be a pediatrician but that he wished to become an anesthesiologist.

29. The plaintiff supported the defendant's desire to change his professional career.

30. In mid 1976, the parties moved to Jackson, Mississippi so that the defendant could follow a residency in anesthesiology.

31. Because the anesthesiology program at the University of Mississippi ceased to exist, the parties moved to Norwich, Vermont in 1977, where the defendant completed his second year of residency at the Mary-Hitchcock Hospital.

32. Following the defendant's completion of his residency in anesthesiology in the summer of 1978, the parties then moved to Rochester, Minnesota, where the defendant was employed on the staff at the Mayo Clinic.

33. The parties stayed in Rochester, Minnesota for two years and while there built a home costing $150,000.00.

34. The defendant decided he did not like teaching. In the Summer of 1980, the parties again moved, this time to Jackson, Mississippi, where the defendant entered into private practice as an anesthesiologist. The parties owned their own home in Jackson.

35. The parties remained in Jackson, Mississippi for two years, after which time they moved to the Newport, Vermont area where the defendant became affiliated with the North Country Hospital.

36. The parties remained in the Newport area living together until October of 1987, when the defendant again determined that he wanted to change his job location and wished to move to Michigan.

37. At that time, the defendant obtained the plaintiff's consent to sell their home in Morgan, Vermont and the defendant took a job as an anesthesiologist in Michigan.

38. The plaintiff went to Michigan with the parties' minor children to acclimate them. She was opposed to the move because she believed it disruptive for the children. The defendant again changed his mind and decided that he did not want to move to Michigan after all.

39. The defendant maintained his practice in the Newport area until September of 1988, when he moved to Wichita Falls, Texas.

40. After the defendant returned from Michigan, the parties' homeplace was sold, with the net proceeds were deposited in the parties' money market account.

41. When the defendant moved to Texas, he took approximately $60,000.00 from the account and divided it between the parties.

42. Following the sale of the house, the plaintiff and the parties' minor children continued to reside in the house as tenants of the new owners.

43. Within a year of the defendant's move to Wichita Falls, Texas, Dr. Denise Niemira, a family practitioner doctor from the Newport area, also moved to Wichita Falls, Texas. The involvement between the two predated this move and Dr. Niemira and Dr. Poston vacationed together in St. Kitts in February, 1988.

44. In September of 1989, Dr. Niemira and the defendant purchased a home together in Wichita Falls, Texas, for the sum of $265,000.00.

45. Although the title to the property was initially taken only in the name of Dr. Niemira, Dr. Poston acknowledges in his affidavit of income and assets, a one-half interest.

46. Dr. Poston's Texas house secures two mortgages, the total debt amounts to $232,000.00.

47. The plaintiff has continued to reside in the Newport area in rental housing with the parties' children.

48. The plaintiff has elected to remain in the Newport, Vermont area so that the children could remain in school in the same location and not have to endure yet another move.

49. During the 16 year period in which the parties were married and resided together, they lived in nine different cities and had fifteen different residences.

50. The parties' oldest child has completed her secondary school education and has graduated from Stanstead College in Stanstead, Quebec. She is now attending college in Florida.

51. The parties' youngest daughter Ellen, started her senior year at Stanstead College in September of 1991.

52. At the time the parties separated, they had the following assets:

Plaintiff		*Defendant*	
IRA Account	$12-$13,000	IRA Account	$12-$13,000
Savings Account	$30,000.00	Savings Account	$30,000.00
Household furnishings	$14,000.00	Household furnishings	$ 2,000.00
Automobile	$ 3,500.00	Automobiles—values unknown	
		Keogh plan	$34,000.00

53. As of April of 1991, the parties had the following assets:

JAMES POSTON

$ 63,428.00	IRA with USSA Investment Management Co.
$124,109.72	Merrill Lynch cash management account
$ 12,000.00	1990 Mitsubishi
	Leased BMW
	House purchased for $265,000.00 with Denise Niemira in September, 1989
$ 14,500.00	Cash assets
$ 3,500.00	Art
$ 2,000.00	Household furnishings

JOANNE POSTON

$ 31,160.00	Community National Bank
$ 3,028.00	Lyndonville Savings Bank
$ 15,000.00	IRA
$ 14,000.00	Household furnishings
$ 8,000.00+/-	1988 SAAB

54. At the time the parties separated, the plaintiff was the primary beneficiary on the defendant's three life insurance policies. These policies totalled $500,000.00.

55. Some time in 1990, over the objection of the plaintiff, the defendant allowed all of these policies to lapse.

56. The plaintiff presently has in effect a life insurance policy in the amount of $500,000.00. The primary beneficiaries on this policy are the parties' two children.

57. By agreement of the parties, the plaintiff did not resume working for remuneration until 1982, at which time she began keeping the books for the defendant's anesthesiology practice. She worked in the defendant's office as a bookkeeper in 1983, 1986 and 1987 for which her only compensation was a $2,000.00 per year contribution to an IRA in her name. This amount was a great deal less than she would have received from an employer and far below what her services were worth.

58. The plaintiff returned to work on a regular part-time basis in 1988 after the separation. She took courses in May, 1988 and resumed work as a registered nurse in the fall of 1988.

59. The defendant's gross income for the years of 1980-1990 has been as follows:

1980	$ 98,629.00	1986	$148,771.00
1981	$237,972.00	1987	$151,871.00
1982	$238,884.00	1988	$158,296.00
1983	$159,743.00	1989	$394,673.00
1984	$153,717.00	1990	$446,701.16
1985	$154,000.00+/-		

60. Although the defendant has enjoyed an above average income since 1978, the parties have not managed to accumulate much in the way of savings.

61. Substantial sums were spent on the parties' moves in pursuit of the defendant's professional goals.

62. During the marriage of the parties, the defendant spent substantial sums on 13 automobiles, including a Porsche and a Ferrari.

63. At the present time, the defendant has two automobiles. A 1989 BMW 535 which he leases at the rate of $890.00 per month and a 1990 Mitsubishi Monterro for which he paid the sum of $18,000.00. His monthly payments were $984.22.

64. In 1989, the defendant purchased a Saab automobile for the plaintiff at a cost of $20,000.00 and a Saab automobile for the parties' oldest child Rachel at a cost of $24,000.00. Plaintiff paid part of the cost of her Saab so that she could have a car with an antilocking brake system.

65. In 1991, the defendant purchased a $25,000.00 Mitsubishi 3000 GTSL for the parties' sixteen year old daughter Ellen.

66. During the parties' marriage, the parties had enjoyed a better than average standard of living due to the defendant's high income.

67. Since seventh grade, each of the parties' two children has attended Stanstead College, a private secondary school, at the cost of $5,000.00 per year per child. Present tuition for Ellen at Stanstead is $6,500.00 per year.

68. The defendant presently provides the parties' two children with credit cards for which they may charge clothing and other items.

69. During the parties' marriage, they often took expensive vacation trips with or without their children.

70. The family enjoyed gift giving. Their average expenses for Christmas presents for the four of them was $3,000.00.

71. At the present time, the plaintiff has expenses in the amount of $4,149.00 per month before taxes. This will not alter when the minor child reaches majority. This represents plaintiff's reasonable needs.

72. The plaintiff's net take home from her work as a registered nurse is $1,523.25 per month.

73. The monthly shortfall between the plaintiff's income and expenses has been made up in the past between alimony/maintenance payments and child support payments from the defendant.

74. As a result of the fact that the plaintiff did not work during the marriage, she has contributed very little to her social security retirement and presently is not eligible for any disability or retirement benefits.

75. Assuming that the plaintiff has 40 quarters of credits at the time she retires, she will be eligible for a social security retirement benefit of $635.00 per month at the age of 65 and $700.00 per month if she retires at the age of 66, based on 1991 rates of payment.

76. In the last three years, the defendant's income as an anesthesiologist has gone from approximately $154,000.00 in 1988, to $386,270.00 in 1989 and to $434,001.00 in 1990. As of June of 1991, he has already earned $211,000.00 for less than six months of the current year.

77. Based upon the information that the defendant presented to the Court in his affidavit of income and assets dated April, 1991, the defendant has monthly cost of living expenses for himself of $8,938.00.

78. In addition, defendant has expenses for taxes in the amount of $9,700.00 per month, for total gross expenses of $18,638.00 per month.

79. The defendant's gross income for the month is $37,239.00.

80. The defendant has a surplus of $18,598.00 each month. This figure represents the difference between his gross monthly income and his gross monthly expenses.

81. The defendant has approximately $243,000.00 available on a yearly basis, after payment of his expenses, for his children's and the plaintiff's support.

82. Even if the plaintiff were to have additional training in her profession, she would never have sufficient income to maintain her current standard of living or have sufficient funds to establish a reasonable retirement account.

83. The present financial condition of the defendant is due in part to the willingness of the plaintiff during the marriage to accommodate herself to his desires to pursue his various professional careers and job changes.

84. For a period of 16 years, the plaintiff invested her time and emotional energy in providing a home to the defendant, raising two children and pursuing the defendant's professional objectives.

85. The plaintiff has incurred and will incur attorney's fees and expenses in the amount of $16,162.28.

86. Plaintiff's attorney's fees are reasonable.

87. At the present time, contrary to his agreement and to the Temporary Order of this Court, the defendant is only paying child support payments in the amount of $2,000.00 per month. There exists an arrearage of $7,000.00 in child support (August, 1991—February, 1992).

88. The combined incomes of the parties takes this case off the child guideline tables.

CONCLUSIONS

A. Jurisdiction

Judge Cheever determined that this Court, and not the 78th District Court of Wichita County, Texas, has jurisdiction over all issues raised by the plaintiff in her complaint. He struck the Texas Order "except to the extent that it divorced the parties and dissolved their marriage." (Order January 9, 1991). The legal conclusions supporting that order are adopted herein and set out below.

"The defendant contends that since the Texas Court had determined that it had jurisdiction over the subject matter, the plaintiff and the two minor children when deciding this matter, that its decision should be given full faith and credit.

"The full faith and credit clause of the Federal Constitution requires the extra-territorial recognition of the validity of a divorce decree obtained in accordance with the requirement of procedural due process in the state by the spouse who under the law of such state had acquired a bona fide domicile there, although the spouse who remained in the state of the original matrimonial

domicile did not appear in the divorce suit and was not served with process in the state in which the divorce was granted." *Loeb v. Loeb*, 118 Vt. 472, 479 (1955) citing *Williams v. North Carolina*, 317 U.S. 287 (1942).

"The defendant contends that Texas acquired jurisdiction over the plaintiff by virtue of the Texas long arm statute and even if the court did not acquire personal jurisdiction over the plaintiff, that it was unnecessary because divorce proceedings are *in rem*.

"A divorce decree must comport with the requirements of due process in the state of the newly domiciled spouse, not the state of the "original matrimonial domicile" *Loeb*, supra at 479. Consequently, Texas law controls this matter.

"Tex. Fam. Code Ann. §3.26, the Texas long arm statute, provides that a court may exercise jurisdiction over a non-resident if "there is any basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction." Although the plaintiff resided in Texas for three years and bore her first child there we do not find that this establishes sufficient minimum contacts with the State of Texas for its court to exercise personal jurisdiction over her since she last resided there over 16 years ago and has had no contact with the State of Texas since that time.

"However, the lack of personal jurisdiction did not prevent the Texas court from granting the parties a divorce. The status of the marriage may be adjudicated at the domicile of one party without establishing any contacts by the nonresident spouse with the state of the forum. *Williams v. North Carolina*, 317 U.S. 287 (1942); *Perry v. Ponder*, 604 S.W. 2d 306 (Tex. Civ. App. 1980).

"A divorce proceeding is a quasi in rem action. *Butler v. Butler,* 577 S.W. 2d 501, 505 (1978); *Thornlow v. Thornlow,* 576 S.W. 2d 697, 701 (1979). "If a court has jurisdiction over the resident spouse, it may render a valid and binding divorce over the non-resident spouse after notice and hearing since it is not exercising personal jurisdiction but is instead exercising jurisdiction over the subject matter, namely the marital status of its citizens." *Butler,* supra at 505.

"In the instant case the defendant was domiciled in Texas when the complaint was filed and therefore had jurisdiction over the defendant. The plaintiff, a non-resident, was served with a citation but failed to appear. The Texas court had quasi in rem jurisdiction to alter the marital status of the parties and this Court therefore gives full faith and credit to Texas court's judgment regarding the divorce.

"Since we have found that the plaintiff did not have sufficient minimum contacts with the State of Texas to subject her to personal jurisdiction there it follows that this Court cannot give full faith and credit to the remainder of the divorce judgment regarding the issues of maintenance, property division, child custody and support.

"With regard to suits affecting the parent-child relationship, 1 Tex. Fam. Code Ann. §11.051 provides that:

> The court may exercise personal jurisdiction over a person on whom service of citation is required or over the person's personal representative, although the person is not a resident or domiciliary of this state, if:
>
> (1) the child was conceived in this state, and the person on whom service is required is a parent or an alleged or probable father of the child;

> (2) the child resides in this state, as defined by Section 11.04 of this code, as a result of the acts or directives or with the approval of the person on whom service is required;
>
> (3) the person on whom service is required has resided with the child in this state; or
>
> (4) notwithstanding Subdivisions (1), (2) or (3) above there is any basis consistent with the constitutions of this state or the United States for the exercise of personal jurisdiction.

"Although a literal reading of this statute would seem to permit a court to exercise personal jurisdiction over a non-resident parent no matter how long the parent and child have been absent from the state, the statute must be interpreted in light of due process requirements. *Dillon v. Medellin*, 627 S.W. 2d 737, 740-741 (Tex. App. 1981).

" "The ultimate test of due process in suits against nonresidents is whether the circumstances are such that 'maintenance of the suit does not offend traditional notions of fair play and substantial justice'. The inquiry must focus on 'the relationship among the defendant, the forum and the litigation'. The defendant's interest in protection against inconvenient litigation must be considered in the light of other relevant factors, including the forum's state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interests of the several states in furthering fundamental substantive social policies." *Perry v. Ponder*, 604 S.W. 2d 306, 314 (1980) (citations omitted); *Corliss v. Smith*, 560 S.W. 2d 166 (1977).

"The defendant has established the factual basis for asserting jurisdiction pursuant to subsections 1 and 3 of the statute. However, proof of such facts alone are not dispositive. *Id.* at 171. Texas courts do not automatically assume jurisdiction, though it may literally exist, when practical considerations warrant otherwise. *Id.* To apply the statute literally in every instance would often offend due process as it would give Texas jurisdiction over many disputes in which the state had little, if no interest. *Id.* at 172. It must be determined whether the facts are constitutionally sufficient to comport with the traditional notions of fair play and substantial justice. *Id.* at 171.

"We find that although the parties were married in Texas and lived there for three years approximately 16 years ago, this is not enough to establish had sufficient minimum contacts with the State of Texas in order for the court to exercise personal jurisdiction over her. The state of Vermont's interest in adjudicating this matter far outweighs any interest in the state of Texas and the plaintiff and the children continue to reside here. Further, it is no less convenient for the defendant to litigate the issues here as it would be for the plaintiff to litigate them in Texas. Lastly, it is more efficient for the Vermont courts to adjudicate the issues when the marital property is located here and any witnesses who may be required to testify more likely reside in Vermont. We therefore find that the Texas court did not have personal jurisdiction to decide the matters of custody or child support.

"Further, the Texas court also lacked subject matter jurisdiction with regard to custody. In 1984, subsequent to the enactment of §11.051 Texas adopted its version of the Uniform Child Custody Jurisdiction Act. 1 Tex. Fam.

Code Ann. §11.51. Pursuant to §11.51 Texas courts have jurisdiction to decide child custody matters when (1) Texas is the home state of the child at the commencement of the proceedings; (2) it appears that no other state would have jurisdiction under subsection (1) of subsection (a); (3) the child is present in Texas; or (4) it is in the best interest of the child that the Texas court assume jurisdiction. None of the above scenarios are present in this case. The plaintiff and the children have resided in Vermont since 1982. Therefore there was no basis for the Texas court to assume subject matter jurisdiction over the matter of custody.

"Lastly, since we have found that the Texas court did not acquire personal jurisdiction over the plaintiff, this Court cannot give full faith and credit to the Texas court judgment regarding property division and maintenance. In order to subject a defendant to a judgment in personam, if he is not present within the territory of the forum, he must have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'. *See, Mitchim v. Mitchim,* 518 S.W. 2d 362 (1975). Since the plaintiff was not subject to the jurisdiction of the Texas court, it had no power to extinguish any rights she may have under Vermont law to financial support from her husband. *Vanderbilt v. Vanderbilt,* 354, U.S. 415, 418 (1957). A court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant. *Id.* at 418 citing *Pennoyer v. Neff,* 95 U.S. 714, 726-27 (1878).

"The defendant also argues that the Court may not award maintenance to the plaintiff because 15 V.S.A. §752 provides for an award of maintenance to a *spouse,* which is defined as a "married person". He argues that

the divorce terminated any right she may have had to maintenance since they are no longer spouses. *See, Loeb,* supra at 472. However, this Court may still order an award of maintenance since the Texas court lacked the power to award maintenance because it is not available in Texas, *Francis v. Francis,* 412 S.W. 2d 29 (Tex. Sup. Ct. 1967); *see also, Grant v. Grant,* 136 Vt. 9 (1978)." [Order—Judge Cheever—January 9, 1991]

Not withstanding the conclusions above, the defendant continues to argue that 15 V.S.A. §752 provides the only authority to issue orders of maintenance, as no common law right to maintenance exists (*Loeb* at 483). Since §752 provides that such an order may issue only "in an action under this chapter" and the applicable causes of action under that chapter are exclusively divorce or modification of a previous maintenance order, the defendant reasons that what is left in this case is neither and the court is therefore without authority to issue a maintenance award. We disagree with the defendant's interpretation.

This matter was properly brought pursuant to 15 V.S.A. §591. The parties were married at the time of filing and the plaintiff brought this action for divorce, seeking dissolution of the marriage, determination of parental responsibilities and contact, and distribution of property and maintenance. This court had jurisdiction over all of these issues when the action was filed. This was an action brought "under this chapter". Defendant argues that plaintiff has lost her cause of action, and therefore, her right to the remedy of maintenance. Plaintiff argues that we retain ancillary jurisdiction to determine the issues over which the Texas court has no jurisdiction and in the case of maintenance, provided plaintiff with no remedy. The concept of ancillary

jurisdiction in divorce cases in which dissolution has been granted by another state was endorsed by the Vermont Supreme Court in *Driver v. Driver*, 148 Vt. 560, 562-63 (1987).

Other courts have dealt with this issue. The Oregon Court of Appeals concluded that it acquired jurisdiction as we have, before the marriage was dissolved by a California Court, and therefore retained it.

> As a result, when it was registered here, the California judgment became an Oregon judgment. The judgment gave the Oregon Court [jurisdiction to make various awards under Oregon statutes] . . . . It thereby gives the court authority to grant that additional relief in a pending case whenever the marriage is dissolved, even if a court of a different state grants the dissolution. *In re Anderson*, Ore. Ct.

App. No. CA-A60034, 16 F.L.R. 1401 (6/13/90).

Defendant argues that there is no statutory authority to determine maintenance after dissolution of the marriage. The Vermont Supreme Court has concluded otherwise. In *Osborne v. Osborne*, 147 Vt. 432 (1986) the Court *vacated* a property settlement and maintenance award. It did not disturb the portion of the lower court's order dissolving the marriage. The Court then remanded the issues of property division and maintenance to the trial court for determination, notwithstanding the fact that the parties were no longer married, nor were they seeking modification. The Court relied on 15 V.S.A. §752(a)(1) and (b)(1), which require judicial consideration of property distribution together with maintenance awards. We rely on these statutory provisions also. At the time *Loeb* was decided, 15 V.S.A. §752 (a)(1) and (b))1) had not been enacted. *See also, Klien v. Klien*, 150 Vt. 466 (1988). *Semprelion v. Semprelion*, 2 V.L.W. (7/26/91).

B. Parenting Responsibilities and Contact

The parties agree that physical rights and responsibilities of the remaining minor child should be with plaintiff. This is appropriate as the child has lived with her mother since the separation, is enrolled in her fourth year of secondary school and her mother has always been her primary caretaker. It is likewise necessary that plaintiff be awarded legal rights and responsibilities solely, given the geographic distance between the parents and between the defendant and the child. The parties do not communicate sufficiently well to award them joint legal rights and responsibilities, nor are they requesting to hold these rights jointly. Legal rights in the defendant would not be practical nor could they be exercised expeditiously in the event of an emergency. Continued contact with defendant during school vacations is desired by the child and the parents. Transportation costs for that contact can best be born by the defendant whose income far exceeds plaintiff's and also is the party who removed himself from the family residence to Texas.

C. Property Distribution and Maintenance

In this case, in spite of the affluence of the parties, there is very little tangible property to distribute. Instead of acquiring property during the marriage, the resources of the parties went toward maintaining a high standard of living and toward meeting the demands of Dr. Poston's education, re-education, and periodic career moves. As a result, the only significant item of value is Dr. Poston's earning capacity.

Earning capacity is not an asset to be disposed of under the property settlement statutes. *Downs v. Downs*, 1 Vt. L.W. 142 (April 6, 1990). It is a factor to

be considered instead in awarding maintenance. *Id.* 144. Maintenance is appropriate where under 15 V.S.A. §752 plaintiff lacks sufficient property and/or income to "provide for .... her reasonable needs" and where she cannot support herself "through appropriate employment at the standard of living established during the marriage or is the custodian of a child of the parties." As the Court pointed out in *Downs,* "Thus, 'reasonable needs' can mean more than mere maintenance and 'appropriate employment' more than the ability to find work. Maintenance is not just a means of providing basic necessities, but rather a flexible tool by which the parties' standard of living may be equalized for an appropriate period of time." *Id.* at 144.

In the existant case the plaintiff has made a career of supporting Dr. Poston's education and career advancement at the sacrifice of her own career options. She maintained his home and private life and raised their children. She worked on the business and of his medical practice for no compensation except the minimal amount necesary to establish a meager IRA. She had a reasonable expectation that her standard of living would be maintained and her retirement provided. Instead, Dr. Poston has removed himself and his income from the family to another state and is with another woman.

Mrs. Poston has returned to her career of twenty years before, that of nursing. Unlike her husband who has enjoyed career changes, re-education and advancement during the past twenty years, she has not. She has no new and well-paid career options, and her future income in nursing is predictably static.

Mrs. Poston's needs as found by this court are reasonable and cannot be met by her employment. Dr. Poston can meet his reasonable needs as found by this

court, and meet Mrs. Poston's reasonable needs and still have a substantial surplus from his earnings. Mrs. Poston's reasonable needs at retirement cannot be met by her IRA or her potential social security. Provision for those needs is the responsibility in part of Dr. Poston.

The maintenance award is considered in connection with the distribution of property. In consideration of the amount and duration of the award, this Court has made no lump sum property award other than affirming the ownership of the property currently in the possession of each of the parties. Any future adjustment of maintenance should take into account this principle.

Inflation is approximately considered (15 V.S.A. 752(b)(7)). It is also appropriate that Dr. Poston's life be insured in a sufficient amount to assure Mrs. Poston of the amounts to which she is entitled.

DATED at Newport, Vermont this 28th day of February, 1992.

SHIREEN AVIS FISHER
Shireen Avis Fisher
Presiding Judge

RICHARD TINKER
Richard Tinker
Assistant Judge

Order of the Orleans Family Court, Orleans County, Vermont dated February 28, 1992

STATE OF VERMONT

ORLEANS COUNTY, SS.

ORLEANS FAMILY COURT

DOCKET NO. S60-89-OsF

JoANNE M. POSTON

VS.

JAMES G. POSTON

ORDER

IT IS ORDERED AND DECREED THAT:

1. "That James Gordon Poston ... and JoAnne Poston ... are now divorced and the marriage between them is fully dissolved." (Adopted from Order of the 78th District Court of Wichita County, Texas, March 20, 1990.)

2. The permanent legal responsibility and physical responsibility of the parties' minor child Ellen, shall be with the plaintiff Joanne M. Poston.

3. The defendant James G. Poston shall have the right of reasonable parent-child contact as follows:

a. For one-half of all the child's school vacations including the summer vacation and the Canadian Thanksgiving vacation and Christmas vacation.

b. The defendant shall be financially responsible for all transportation arrangements for visitation.

4. The defendant shall pay the secondary school tuition for the parties' minor child.

5. The defendant shall maintain health insurance for the parties' minor child and shall pay all deductible expenses as well as all dental, eye care, and orthodontic expenses for the parties' minor child.

6. The defendant shall pay child support to the plaintiff for the parties' minor child at the rate of $2,500.00 per month until the parties' minor child has attained the age of eighteen or completed her secondary education whichever shall last occur.

7. The defendant shall be responsible for all car payments for the child's vehicle as well as all insurance and repair bills for her vehicle.

8. The defendant shall maintain in effect a life insurance policy in the amount of at least $500,000.00 with the plaintiff named as the beneficiary until such time as his obligations to the plaintiff under the terms of this Order have been completed.

9. The defendant shall pay to the plaintiff, as permanent maintenance support, the sum of $1,000.00 per month until such time as the parties' minor child attains the age of majority or completes her secondary school education, whichever shall last occur, and child support ceases. Thereafter, permanent maintenance support to the plaintiff shall be paid at the rate of $60,000.00 per year or a monthly rate of $5,000.00. This amount includes $1,000.00 per month ($12,000.00 per year) to help provide a retirement income for the plaintiff. This amount shall be increased at the rate of 4% each year to take into account inflation.

10. The defendant's obligation to pay permanent maintenance shall cease at such time as the plaintiff attains the age of 62, or upon her death should it occur prior to reaching age 62. Defendant's obligation is reduced to $12,000.00 per year ($1,000.00 per month) in the event of her remarriage. This amount shall increase at the rate of 4% per year to take into account inflation.

11. Each party is awarded all items of real and tangible and intangible personal property in his or her possession, except as otherwise set forth herein. Although this would appear to give defendant considerably more in assets than would be warranted under any fair consideration of 15VSA §751(b), this otherwise inequitable distribution is corrected by the permanent maintenance award set out above and granted in lieu of additional distribution of assets to the plaintiff.

12. The defendant shall pay to the plaintiff the sum of $1,500.00 per month as a maintenance supplement for so long as the defendant is obligated to pay child support under the terms of this order.

13. Defendant is to pay plaintiff forthwith the sum of $7,000.00 in child support arrearages.

DATED at Newport, Vermont this 28th day of February, 1992.

SHIREEN AVIS FISHER
Shireen Avis Fisher
Presiding Judge

RICHARD TINKER
Richard Tinker
Assistant Judge

STATUTES

§3.26. Acquiring Jurisdiction Over Nonresident Respondent

(a) If the petitioner is a resident or a domiciliary of this state at the commencement of a suit for divorce, annulment, or to declare a marriage void, the court may exercise personal jurisdiction over the respondent, or the respondent's personal representative, although the respondent is not a resident or a domiciliary of this state if:

(1) this state is the last marital residence of the petitioner and the respondent and the suit is commenced within two years after the date on which marital residence ended; or

(2) there is any basis consistent with the constitutions of this state and the United States for the exercise of the personal jurisdiction.

(b) A court acquiring jurisdiction under this section also acquires jurisdiction over the respondent in a suit affecting the parent-child relationship.

Added by Acts 1975, 64th Leg., p. 622, ch. 254, s 8, eff. Sept. 1, 1975.
Amended by Acts 1983, 68th Leg., p. 705, ch. 160, s 3, eff. Sept. 1, 1983.

HISTORICAL AND STATUTORY NOTES

The 1983 amendment, in subsec. (a) in subd. (1) substituted "marital residence of the" for "state in which marital cohabitation between", deleted "occurred" following "and the respondent", and substituted "marital residence" for "cohabitation" following "date on which" and in subd. (2) deleted "notwithstanding Subdivision (1) above," at the beginning and substituted

"constitutions" for "constitution" and "and" for "or"; in subsec. (b) inserted "over the respondent" and substituted "relationship" for "relation if Section 11.051 of this code is applicable".

§11.051. Acquiring Jurisdiction Over Nonresident

In a suit affecting the parent-child relationship, the court may exercise status or subject matter jurisdiction over the suit as provided by Subchapter B of this chapter. [FN1MV] The court may also exercise personal jurisdiction over a person on whom service of citation is required or over the person's personal representative, although the person is not a resident or domiciliary of this state, if:

(1) the child was conceived in this state when at least one biological parent was a resident of this state and the person on whom services is required is a parent or an alleged or probable father of the child;

(2) the child resides in this state as a result of the acts or directives or with the approval of the person on whom service is required;

(3) the person on whom service is required has resided with the child in this state; or

(4) there is any basis consistent with the constitutions of this state and the United States for the exercise of the personal jurisdiction.

Added by Acts 1975, 64th Leg., p. 1255, ch. 476, s 7, eff. Sept. 1, 1975.
Amended by Acts 1983, 68th Leg., p. 707, ch. 160, s 7, eff. Sept. 1, 1983.

HISTORICAL AND STATUTORY NOTES

The 1983 amendment in the introductory language inserted "status or subject matter jurisdiction over the suit as provided by Subchapter B of this chapter. The court may also exercise"; in subd. (1) inserted "when at least one biological parent was a resident of this state"; in subd. (2) deleted ", as defined by Section 11.04 of this code," following "in this state"; in subd. (4) deleted "notwithstanding Subdivisions (1), (2), or (3) above," at the beginning and substituted "and" for "or" preceding "the United States".